No. 423

RECORD

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IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,630

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Relator-Petitioner,

vs.

EDWARD T. HYDE,

Plaintiff-Respondent,

vs.

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,

Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

IN THE

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a Corporation,
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

EDWARD T. HYDE,

Plaintiff,

v.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

COMPLAINT

Civil No. 2850

PLAINTIFF, for his cause of action against the above-named defendant, alleges:

I.

That this cause of action arises under the provisions of Title 45, Sections 51-60, of the United States Code, commonly known as the Federal Employers' Liability Act.

II.

That the defendant now is, and at all times herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of Minnesota, and as such, engaging in the business of owning, maintaining and operating a line and system of railroad as a common carrier, and that its said line and system of railroad extends in part through the States of Minnesota, Montana and Washington, and other states unnecessary to be herein particularly mentioned.

III.

That at all times herein mentioned, the defendant was an interstate carrier and was engaged in interstate transportation and commerce, and that plaintiff was employed by the defendant as its servant and employee, and, as such, was working and engaged in interstate transportation and commerce at the time of receiving his injuries, as hereinafter alleged, and was working in furtherance of interstate commerce and in work which directly, closely and substantially affected the general interstate commerce carried on by said defendant as a railway common carrier of passengers and freight for hire.

IV.

That at all times herein material, the defendant owned, operated and maintained as a part of its line and system of railroad certain yards, tracks, locomotives, cars, railroad facilities and appurtenances, including a yard located at Seattle, Washington, known as the Seattle House Yard, located in the vicinity of the King Street Station.

V.

That on or about the 6th day of November, 1955, plaintiff was in the employ of the defendant as a switch foreman and was a member of one of the defendant's switch crews, each and all of whom were in the employ of the defendant and were engaging in the course and scope of their said employment in switching cars for the defendant in its said Seattle House Yard at Seattle, Washington; that one of the switching movements in which plaintiff and the members of said crew were engaging consisted of moving the locomotive being used by said crew in a southerly direction and along the lead track and into Track 10 and coupling onto a cut of approximately five cars then standing on said track; that during the course of the movement along the lead track, defendant's employee and field man of the crew negligently and without cause or permission so to do discontinued his duties, refused

to continue on with his work and absented himself from the vicinity of said movement; that after coupling onto said cut of cars standing on Track No. 10, they were pulled southerly onto the lead track, and thereafter the two most northerly cars of said cut of cars were kicked toward and onto Track No. 11 where they came to a stop before leaving sufficient clearance to permit cars to enter adjacent Track No. 10; that while plaintiff was attempting to carry out his own duties and those of the absent employee field man, and while, due to the absence of said field man, plaintiff was attempting in the darkness to determine the position of the cars which had been kicked to Track No. 11 before kicking other cars toward Track No. 10, the defendant's employee following the engine and the crew operating the engine negligently, carelessly and in violation of plaintiff's signals and orders, and instructions uncoupled from said engine and kicked and moved a cut of approximately three cars northerly towards Track No. 10, whereupon plaintiff observed that said cut of cars if not stopped would collide with the cars on Track No. 11, and to avoid said impending collision and the resultant damage, plaintiff climbed to one of said moving cut of cars and applied the handbrake thereon for the purpose of bringing said cars to a stop short of a collision, and that while plaintiff was engaging in the work of applying the handbrake on said moving car in the usual and customary manner so as to effect a safe and secure braking of said car, said handbrake on said car was so inefficient, defective and out of repair that it failed to function and operate and failed to slow or stop the movement of said cars which continued to move and collided violently with the cars standing on Track No. 11, and plaintiff, who was standing on the brake platform of said moving car, was caught between said car as it collided with the cars on Track No. 11 and was crushed and thrown to the ground, and he thereby sustained serious and permanent injuries, as hereinafter alleged.

VI.

That said occurrence and the resulting injuries to plaintiff were directly and proximately caused by the violation by the defendant of the Safety Appliance Act of the United States in moving, using and hauling a car which was not equipped with an efficient handbrake and permitting said car to be used and hauled upon its line and system of railroad in said condition, and by operating, hauling, using and permitting said car to be used, hauled and operated, equipped with a handbrake which was inefficient and which was defective and out of repair.

VII.

Plaintiff further alleges that in addition to said violation by the defendant of the Safety Appliance Act of the United States, as aforesaid, said collision and the resulting injuries to plaintiff were directly and proximately caused or contributed to by the negligence of the defendant, its agents, servants and employees, other than plaintiff, in one or more of the following particulars:

A. That the defendant's said field man negligently failed and neglected to carry out the duties of his employment as a member of said switching crew, thereby subjecting plaintiff to extraordinary perils and hazards.

B. That the defendant's said employee whose duty was that of following the engine and the defendant's engine crew operating the switch engine negligently caused cars to be cut off from the engine and kicked toward Track No. 10 without signals or instructions from plaintiff so to do, and after instructions from plaintiff not to make such movement until plaintiff gave authorization for such movement of the cars.

C. That the defendant's engine crew operating said switch engine negligently failed to kick the cut of cars to Track No. 11 at a sufficient speed to permit said cars to run into the clear on said Track No. 11.

D. That the defendant, its agents, servants and employees, other than the plaintiff, negligently failed to keep a proper and adequate lookout for the safety of plaintiff.

E. That the defendant negligently failed to provide and maintain for plaintiff a reasonably safe place to work.

F. That the defendant negligently failed to make a timely and adequate inspection of the car and its handbrake upon which plaintiff was riding and attempting to control its movement by application of the handbrake thereon.

G. That the defendant negligently failed to warn plaintiff of the inefficient, inadequate and defective condition of said handbrake.

H. That the defendant negligently failed to provide said yard and tracks with adequate and sufficient lighting facilities.

I. That the defendant negligently failed to adopt and enforce a reasonably safe plan and method of performing said work.

VIII.

That by reason of defendant's violation of the Safety Appliance Act of the United States and its negligence as hereinbefore alleged, plaintiff was severely and permanently injured about his entire body; that among the injuries he so received, the bones, vertebrae, intervertebral discs, spinal cord, muscles, tissues, ligaments, nerves and blood vessels of his back and spine were injured and damaged with resulting complete and permanent paralysis and loss of control of all of his lower body and its functions, the plaintiff was required to and did submit to surgery in an attempt to alleviate all of his injuries without beneficial result; the bones, muscles, tissues, ligaments, tissues and nerves of his right thigh and leg were crushed, torn and lacerated; he sustained a severe concussion of his brain; he received multiple bruises and contusions about his body; he suffered a severe

shock to his nervous system, all of which injuries caused plaintiff great pain and prolonged suffering, and he still suffers and will continue to suffer great and permanent bodily and mental pain and humiliation.

IX.

That at the time of being injured, as herein alleged, plaintiff was earning and capable of earning at his employment as a switch foreman a wage of $4,500.00, or more, a year, but by reason of being so injured, as herein alleged, plaintiff's earning capacity has been wholly lost and destroyed since the time of being so injured and will be wholly lost and destroyed for the remainder of his life.

X.

That by reason of the facts hereinbefore alleged, plaintiff has suffered and sustained at the hands of the defendant damages in the sum of FOUR HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($475,000.00).

WHEREFORE, plaintiff prays judgment against the defendant for the sum of FOUR HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($475,000.00), together with his costs and disbursements herein.

PLAINTIFF DEMANDS TRIAL BY JURY.

EUGENE A. RERAT
Attorney for Plaintiff
610 Baker Building
Minneapolis 2, Minnesota

(Filed in the United States District Court, District of Minnesota, Third Division on February 23, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit A.)

(Title and Venue)

ANSWER

Civil No. 2850

Comes now the defendant and for its answer to the complaint herein:

I.

Admits the allegations contained in Paragraphs II, III and IV of said complaint.

II.

Admits that on or about November 5, 1955, plaintiff was employed by the defendant as a switch foreman and that while so employed, plaintiff received accidental injuries.

III.

Defendant specifically denies that the accidental injuries sustained by plaintiff on or about November 5, 1955, were in any way caused or contributed to by any negligence or carelessness whatsoever on the part of this defendant or any of its agent, servants or employes.

IV.

Save and except as is herein admitted or otherwise qualified, defendant denies each and every allegation in said complaint contained.

V.

Further answering said complaint defendant alleges that the accidental injuries sustained by plaintiff on or about November 5, 1955, as alleged in said complaint or otherwise, were solely caused or contributed to by the negligence or carelessness of the plaintiff himself in the manner in which he performed his work at said time and place.

WHEREFORE, defendant prays that plaintiff take nothing by his action herein and that defendant have and recover

judgment in its favor, together with its costs and disbursements herein.

J. R. WALKER
DON E. ENGLE
By Don E. Engle
Attorneys for Defendant
175 E. Fourth Street
St. Paul 1, Minnesota

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit B.)

(Title and Venue)

NOTICE OF MOTION

To: Eugene A. Rerat, Attorney for Plaintiff, 610 Baker Building, Minneapolis 2, Minnesota

PLEASE TAKE NOTICE:

That on the 26th day of March, 1956, at 10:00 o'clock a.m. on that day, or as soon thereafter as counsel can be heard, defendant will move the above-named court, at the Federal Courts Building, in the City of St. Paul, for an order under the provisions of Section 1404(a) of the Judicial Code of the United States transferring the above-entitled action from the United States District Court for the District of Minnesota, Third Division, to the United States District Court, District of Washington, for trial before the court sitting at Seattle, Washington, and that said motion will be based upon the affidavits of R. W. Plunkett, Don E. Engle, Millard P. Thomas, Robert H. Shober, Dr. John R. Mullins, Dr. Louis J. Schienman, Dr. Wolfgang W. Klemperer, Dr. Ira O. McLemore, Dr. Paul E. Ruuska and Dr. Frederick K.

Remington attached hereto, and upon the pleadings, files and records herein.

Dated this 9th day of March, 1956.

J. R. WALKER
DON E. ENGLE
By Don E. Engle
Attorneys for Defendant
175 East Fourth Street
St. Paul 1, Minnesota

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit C.)

(Title and Venue)

AFFIDAVIT OF R. W. PLUNKETT

State of Minnesota
County of Ramsey—ss

R. W. Plunkett, being first duly sworn, deposes and says that he is the General Claims Attorney of the defendant Great Northern Railway Company and as such he has supervision of and directs the investigation of accidents arising on the Great Northern Railway; that he caused an investigation to be made of the accident involved in the above-entitled case as a result of which the plaintiff Edward T. Hyde claims to have sustained personal injuries; that said accident happened at or near Seattle, Washington, on November 5, 1955, at approximately 11:30 P.M.; that at said time and place plaintiff was in the employ of defendant railway company as a switch foreman and was engaged as a member of a train crew which was operating one of defendant's trains performing switching operations in or near

Seattle, Washington, and affiant states that he is familiar with the file covering the investigation of said accident.

Affiant further states that Seattle, Washington, is approximately 1,783 miles from St. Paul, Minnesota.

Affiant further states that on or about November 5, 1955, the date on which the accident occurred, and for some time prior thereto, Edward T. Hyde, plaintiff above named, was a resident of Seattle, Washington. Affiant is informed and believes that plaintiff's home is still at said place and plaintiff's wife resides therein, but that plaintiff is temporarily located at the Veterans Administration Hospital, Long Beach, California.

Affiant further states that at the time of said accident defendant's train crew and switch crew consisted of the following named persons in addition to said Edward T. Hyde, plaintiff herein:

Rene Vander Poll—Engineer
Earl W. Frank—Fireman
Robert K. Doremus—Switchman
William E. Absher—Switchman

That all of said persons live at Seattle, Washington. That all and each of the members of said train crew and switch crew above named have personal knowledge of the facts surrounding the accident on November 5, 1955, involving the plaintiff herein, and if called as witnesses by the defendant would testify to the work which was being done by the members of the train and switch crews and including the plaintiff, Edward T. Hyde, immediately before and at the time of said accident; that each of said persons knows the manner in which the work of the train crew and switch crew was being performed at the time and knows the events and circumstances which occurred and existed immediately before and at the time and after the alleged accident; that each of said persons knows and can describe the efforts made by members of the crew in order to guard against said accident.

Affiant further states that F. Febach, car foreman, Charles S. Williams, assistant car foreman, Karl R. Michelson, carman, and Carl Fredrickson, carman, are residents of Seattle, Washington, and employees of the defendant, and as such employees made an inspection of car #GN 32549 and car #FGEX 1133, which were the cars involved in said accident; that said inspection was made of said cars on November 6, 1955, and that if called as witnesses in this case they would testify of their own knowledge the condition of car #GN 32549 and car #FGEX 1133 and the various parts of said cars and they would testify that said cars and parts of the cars were in good condition and had no defects except for the damage which occurred in the alleged accident.

Affiant further states that immediately after said accident on November 5, 1955, the plaintiff was treated by Dr. Frederick K. Remington, who resides and practices at Seattle, Washington, and that said Dr. Remington treated said plaintiff from November 5, 1955, up until January 30, 1956, at which time said plaintiff Edward T. Hyde was admitted to the Veterans Administration Hospital, Long Beach, California, and that said Dr. Remington, if called as a witness on behalf of the defendant, would testify as to the nature of the injuries of which plaintiff complained and the type of treatment which was given plaintiff during the course of said Dr. Remington's treatment of plaintiff and that said Dr. Remington would testify as to the diagnosis and prognosis which he made of plaintiff's condition.

Affiant further states that on November 6, 1955, Dr. John R. Mullins made a neurological examination of the plaintiff at the request of Dr. Frederick K. Remington for the purpose of diagnosis and treatment of the plaintiff; that said Dr. Mullins' medical practice is specialized in the field of internal medicine and neurology.

Affiant further states that on November 14, 1955, Dr. Louis J. Schienman made an urological examination of the plaintiff at the request of Dr. Frederick K. Remington for

the purpose of diagnosis and treatment of the plaintiff; that said Dr. Schienman treated said plaintiff from November 14, 1955, until January 30, 1956, as an urology specialist; that said Dr. Schienman's medical practice is specialized in the field of urology.

Affiant further states that on November 6, 1955, Dr. Wolfgang W. Klemperer performed a decompression laminectomy and subdural exploration operation on said plaintiff at the request of Dr. Frederick K. Remington for the purpose of diagnosis and treatment of the plaintiff; that said Dr. Kelnperer's medical practice is specialized in the field of neural surgery.

Affiant further states that on December 28, 1955, Dr. Ira O. McLemore made an examination of the plaintiff at the request of Dr. Frederick K. Remington for the purpose of diagnosis and treatment of the plaintiff; that said Dr. McLemore's medical practice is specialized in the field of orthopedic surgery.

Affiant further states that on November 6, 1955, Dr. Paul E. Ruuska performed a reduction of a compound fracture of the left tibia and fibula by operation on said plaintiff, and that said Dr. Ruuska treated said plaintiff from November 6, 1955, until January 30, 1956, for said compound fractures; that said operation and treatment was performed at the request of Dr. Frederick K. Remington for the purpose of diagnosis and treatment of the plaintiff; that said Dr. Ruuska's medical practice is specialized in the field of orthopedic surgery and fractures.

Affiant further states that said Drs. Mullins, Schienman, Klemperer, McLemore and Ruuska, if called as witnesses on behalf of the defendant, would testify as to the nature of the injuries of which plaintiff complained and the type of treatment which was given plaintiff or recommended to Dr. Remington to be given plaintiff, and that said Drs. Mullins, Schienman, Klemperer, McLemore and Ruuska would testify

as to the diagnosis and prognosis which each made of plaintiff's condition.

Affiant further states that on November 5, 1955, A. W. Rottweiler was employed by defendant as a claim agent and as such he works and resides at Seattle, Washington, and that if called as a witness by defendant he would testify concerning his investigation of said accident pertaining to statements which he obtained from the members of the engine and switch crews and various other employees of said defendant; that he would further testify concerning photographs which he took at the scene of the accident immediately after the occurrence thereof.

Affiant further states that on November 5, 1955, G. B. Osborne was employed by defendant as a claim agent and as such he works and resides at Seattle, Washington, and that if called as a witness by defendant he would testify concerning his investigation of said accident pertaining to statements which he obtained from the members of the engine and switch crews and other employees of said defendant, exclusive of the statements obtained by A. W. Rottweiler.

Affiant further states that on November 5, 1955, Walter Fitzgerald was employed by defendant as an instrument man in the Engineering Department and that W. E. Brough was employed by defendant as Office Engineer; that said W. E. Brough on said date worked and resided at Seattle, Washington, and presently resides in Seattle, Washington; that said Walter Fitzgerald on said date worked at Seattle, Washington, and resided at Everett, Washington, and presently works and resides in Seattle and Everett, Washington; that if called as witnesses said Walter Fitzgerald and said W. E. Brough would testify concerning an engineering survey which said persons made of the area where said accident occurred shortly after the occurrence thereof; that said engineering survey includes the data necessary for the preparation of a plat and profile concerning the area where the accident occurred as it existed on November 5, 1955.

Affiant further states that on November 6, 1955, Elmer Doty, who was employed by the Art Craft Studios, Seattle, Washington, was engaged by the defendant to take photographs of the railroad cars involved in said accident and that on said date said Elmer Doty took said photographs; that if called as a witness by defendant said Elmer Doty would testify concerning said photographs taken by him on November 6, 1955.

Affiant further states that on November 5, 1955, Douglas Hoag was employed by defendant as Terminal Trainmaster and as such he works and resides at Seattle, Washington, and that if called as a witness by defendant he would testify concerning the existence of certain rules at the time of said accident governing the work of a switch foreman working in the Seattle-Interbay Terminal Yards, the date he last examined said Edward T. Hyde on said book of rules, that he had never been notified at any time prior to said accident by said Edward T. Hyde or any other person representing the switchmen working in the Seattle-Interbay Terminal Yards of a defective lighting condition or defective track condition existing in the yard where said accident occurred, the position or location of the cars involved in said accident immediately after the accident, the weather conditions existing at the time of said accident, the lighting conditions existing in the yard where said accident occurred at the time that said accident occurred, and that there are no other switching yards on the Cascade Division which are illuminated by floodlights to aid the switching crews in making switching movements.

Affiant further states that on November 5, 1955, George Alexander was employed by defendant as a yardmaster and as such he works in the Seattle-Interbay Terminal Yards and resides at Seattle, Washington, and that if called as a witness by defendant he would testify to the number of times said Edward T. Hyde had worked in the switching yard where said accident occurred, that the judgment used by

said Edward T. Hyde in making the switching move which resulted in said accident was not a proper switching movement, the location of cars on track No. 11 at the time of said accident, the extent to which the floodlights existing in the yard where said accident occurred were used for switching purposes, the location of the cars involved in said accident immediately subsequent to said accident, the weather conditions existing at the time of said accident and the lighting conditions existing at the time of said accident.

Affiant further states that on November 5, 1955, Elton L. Conaway was employed by defendant as a transportation inspector and as such he works and resides at Seattle, Washington, and that if called as a witness by defendant he would testify that the absence of Switchman Abshur at the time of said accident in no way caused or contributed to the happening of said accident and that if said Switchman Abshur had been present at the time of said accident he would not have participated in the movement which resulted in said accident, and that it was not good railroading practice for said Edward T. Hyde to conduct himself in the manner in which he conducted himself immediately prior to and at the time of said accident when said Edward T. Hyde apparently attempted to prevent the cornering of cars on track Nos. 10 and 11.

Affiant further states that on November 5, 1955, S. J. Markle was employed by defendant as a special agent and as such he works and resides at Seattle, Washington, and that if called as a witness by defendant he would testify concerning the location of the cars involved in said accident immediately after said accident occurred, the weather conditions existing at the time of the occurrence of said accident, and the lighting conditions existing at the time of said accident.

Affiant further states that on November 5, 1955, R. J. Turk was employed by defendant as Electrical Superintendent and as such he works and resides at Seattle, Washington, and that

if called as a witness by defendant he would testify concerning the floodlights located in the yard where said accident occurred, the date said floodlights were installed, the purpose of such installation and the type of floodlights installed in said yard.

Affiant further states that on November 5, 1955, Einer Johnson was employed by defendant as an electrical foreman and as such he works and resides at Seattle, Washington, and that if called as a witness by defendant he would testify concerning the fact that the floodlights which were located in said yard where said accident occurred were in good operating condition, when the lights in said floodlights were replaced immediately prior and subsequent to said accident and the location of the various switches for turning on said floodlights.

Affiant further states that if the above-entitled action is tried at St. Paul, Minnesota, that each of the nineteen witnesses from Seattle, Washington, will be compelled to travel approximately 1,783 miles to the place of trial and a like distance to return to their homes, whereas if said action is tried at Seattle, Washington, each of said nineteen witnesses will have to travel only two or three miles to the place of the trial; that each of the persons above named would have to spend four additional days and four additional nights in additional travel time.

Affiant has been informed by Don E. Engle, one of the attorneys of record for the Great Northern Railway Company, and believes that if said case is tried at St. Paul, Minnesota, that it would be necessary for each of the nineteen witnesses to remain at the trial of said action throughout, and your affiant has been informed by said Don E. Engle and believes that said trial will last seven days; that affiant has also been informed by said Don E. Engle and believes that if said case is tried at Seattle, Washington, that each

of the above nineteen witnesses would not be forced to remain in attendance throughout the entire trial of the entire case but could be released to return to their work as soon as they have completed their testimony.

Affiant further states that if the above named persons, excluding Dr. Frederick K. Remington, Dr. John R. Mullins, Dr. Louis J. Schienman, Dr. Wolfgang W. Klemperer, Dr. Ira O. McLemore, Dr. Paul E. Runska, Douglas Hoag, George L. Alexander, G. B. Osborne, A. W. Rottweiler, Elton L. Conaway, S. J. Markle, R. J. Turk, Walter Fitzgerald, Einer Johnson, W. E. Brough and Elmer Doty, are required to absent themselves from their regular work in order to attend the trial of this case that the defendant Great Northern Railway Company, under the schedule or agreement with the craft or brotherhood to which said men belong, would be obligated to pay them at least their regular time for each day so absent in addition to their traveling and living expenses while absent from their work for the purpose of testifying as witnesses in this action. Affiant states that in connection with his duties as an employee of the railway company he has had to reimburse other employees for their expenses and arrange for reimbursement of time lost in connection with other cases and that he is familiar with the cost thereof; that if this case is tried at St. Paul rather than at Seattle, Washington, the additional cost to the defendant; assuming a seven day trial, would be $3,982.72; that said additional cost will be composed of items and amounts as shown on Exhibit "A" attached hereto and made a part hereof.

Affiant further states that he has made a full and complete disclosure of the facts surrounding said accident to said Don E. Engle, one of defendant's attorneys, and that he has been advised by said Don E. Engle that the railway company has a good and sufficient defense to the issues of fact and law in said action.

Affiant states that this affidavit is made in support of a motion to change the venue of said action *from St. Paul*, Minnesota, to Seattle, Washington.

R. W. PLUNKETT

Subscribed and sworn to before me
this 9th day of March, 1956.
Lenore F. Cadrow

Notary Public, Ramsey County, Minn.
My commission expires June 23, 1956.
(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956; attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit C.)

EXHIBIT "A"

Name	Additional Travel Time	Additional Time Attending Trial at St. Paul	Pay for Eight Hours	Thirteen Days Additional Living Expenses	Total Additional Expenses
Wm. E. Abshur	4	7	$18.15	$130.00	$293.35
Robt. K. Doremus	4	7	18.15	130.00	293.35
Rene Vander Pool	4	7	18.71	130.00	298.39
Earl W. Frank	4	7	15.87	130.00	272.83
F. Febach	4	7	22.27	130.00	330.43
Charles S. Williams	4	7	20.22	130.00	311.98
Karl R. Michelson	4	7	15.91	130.00	273.19
Carl Fredrickson	4	7	15.91	130.00	273.19
Geo. L. Alexander	4	7	22.89	130.00	336.01
G. R. Osborne	4	7	—	130.00	130.00
A. W. Rottweiler	4	7	—	130.00	130.00
S. J. Markle	4	7	—	130.00	130.00
Elton L. Conaway	4	7	—	130.00	130.00
R. J. Turk	4	7	—	130.00	130.00
Walter Fitzgerald	4	7	—	130.00	130.00
D. D. Hoag	4	7	—	130.00	130.00
Einar Johnson	4	7	—	130.00	130.00
Elmer Doty	4	7	—	130.00	130.00
W. E. Brough	4	7	—	130.00	130.00
					$3982.72

(Title and Venue)

AFFIDAVIT OF DON E. ENGLE

State of Minnesota
County of Ramsey—ss

Don E. Engle, being first duly sworn, deposes and says that he is one of the attorneys for the Great Northern Railway Company, defendant in the above-entitled action, and as such he will be the attorney who will try the case for the defendant if the case is tried at St. Paul, Minnesota; that he has read the complaint of the plaintiff in the above-entitled action and that he prepared the answer of the defendant on file with this court after he had read the investigation file of the defendant, which disclosed the facts and circumstances relating to and surrounding the happening of the accident referred to in the complaint. Affiant states that R. W. Plunkett, General Claims Attorney for the Great Northern Railway Company, has made a full and complete disclosure to him of the facts involved in the accident out of which this action arose, and affiant believes and so informed said R. W. Plunkett that the defendant Great Northern Railway Company has a good and sufficient defense on the merits to said action. Affiant states that the defendant, upon the trial of this case, will have the burden, at least in the eyes of the jury, of proving that this accident did not occur as a result of any negligence on the part of the defendant railway company; affiant further states that he believes that the facts as disclosed to him and as they will be testified to by the witnesses set forth in the affidavit of R. W. Plunkett will be sufficient to establish that there was no negligence on the part of the defendant Great Northern Railway Company which caused or contributed to the happening of the accident.

Affiant further states that he has read the foregoing affidavit of R. W. Plunkett and affiant states that all and each of said witnesses named in said affidavit of R. W. Plunkett would be and will be necessary and material witnesses at

the trial of said case and that each of said witnesses would be produced in person to testify concerning their knowledge of the facts in this case; that each of the witnesses named in the affidavit of R. W. Plunkett would be competent and that their testimony would be relevant and material to the issues involved in this action.

Affiant further states that the production of the testimony of the 19 employee witnesses named in the affidavit of R. W. Plunkett in deposition form would be extremely unsatisfactory, and that if their said testimony would be produced in deposition form at the trial of this case at St. Paul, Minnesota, that the rights of the defendant Great Northern Railway Company would be seriously prejudiced in the eyes of the jury and that; therefore, each of the said 19 witnesses would be produced in person at the trial of this case.

Affiant also states that the testimony of Dr. John R. Mullins, Dr. Louis J. Schienman, Dr. Wolfgang W. Klemperer, Dr. Ira O. McLemore, Dr. Paul E. Ruuska and Dr. Frederick K. Remington would be material and competent testimony bearing upon the issues to be tried in this case and that it would be necessary for the defendant to produce the testimony of these doctors; that as appears from the affidavits attached hereto said doctors would refuse to voluntarily appear at St. Paul, Minnesota, for the trial of this case if it were to be tried at St. Paul, Minnesota; that as a consequence thereof defendant would be forced to go to the expense of taking the deposition of said doctors at their place of residence and practice and that the presentation of the testimony of these doctors to a jury in deposition form would not be a satisfactory means of presenting such testimony to a jury and that, therefore, the rights of the defendant would be seriously prejudiced in this case.

Affiant further states that if said case is transferred to Seattle, Washington, for trial that the defendant will make arrangements to have said case tried and handled by its

regular salaried company attorneys residing in the City of Seattle, Washington, rather than go to unnecessary expense of having said action tried by your affiant or any other attorney from defendant's general offices in St. Paul, Minnesota.

Affiant further states that if said cases were tried at St. Paul, Minnesota, the defendant would be unable to release any of its employee witnesses so that they can return to their regular work on the railroad, but the defendant would be forced to keep said employee witnesses in attendance throughout the entire trial of the case at St. Paul, which would be approximately seven days; where, if said case were tried at Seattle, Washington, said employee witnesses could be released to return to their duty as soon as they had completed their testimony.

Affiant states that in his opinion it would be most convenient for the parties and witnesses in this action and it would be in the interest of justice to transfer the action to the United States District Court for the District of Washington, at Seattle, Washington, which court will next meet for the trial of jury cases on May 1, 1956.

Affiant further states that in addition to the above facts that if said case were tried at St. Paul, Minnesota, the defendant and the court would be deprived of its right to request that the jury be allowed to view the scene where said accident occurred and that in affiant's opinion it would be extremely beneficial for the jury in this case to view the scene where said accident occurred so as to gain a basic understanding of the facts of this case and of the scene where said accident occurred.

Affiant states that this affidavit is made in support of a motion under Section 1404(a) of the United States Judicial Code for an order of this court transferring the above en-

titled action to the United States District Court, District of Washington, for trial at Seattle, Washington.

Dated at St. Paul, Minnesota, this 9th day of March, 1956.

DON E. ENGLE

Subscribed and sworn to before me
this 9th day of March, 1956.
Lenore F. Cadrow

Notary Public, Ramsey County, Minn.
My commission expires June 23, 1956.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit C.)

(Title and Venue)

AFFIDAVIT OF MILLARD P. THOMAS

State of Washington
County of King—ss

Millard P. Thomas, being first duly sworn, deposes and says that he is the Clerk of the United States District Court of the Western District of Washington, Northern Division, and that as such he is familiar with the docket and calendar of said court.

Affiant further states that the United States District Court for the Western District of Washington, Northern Division, regularly sits for trial of court and jury cases at Seattle, Washington; that the next term of court for the trial of court

and jury cases at Seattle, Washington, will be held commencing the first Tuesday in May, 1956.

MILLARD P. THOMAS

Subscribed and sworn to before me
this .... day of ....., 1956.
Woodrow L. Taylor
Notary Public

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit C.)

(Title and Venue)

AFFIDAVIT OF ROBERT H. SHOBER

State of Washington
County of King—ss

Robert H. Shober, being first duly sworn, deposes and says that he is the Superintendent of the Cascade Division of the Great Northern Railway Company, the defendant in the above-entitled action; that the headquarters of said Cascade Division are at Seattle, Washington, and his headquarters are there; that as Superintendent of said Cascade Division he is in general charge of the operations of the Great Northern Railway Company within said Cascade Division and has jurisdiction over and supervision of switchmen, engineers, firemen, yardmasters and carmen working on said Cascade Division; that the Seattle-Interbay Terminal Yards are a part of said Cascade Division; that the whole of said Cascade Division comprises that portion of the Great Northern railroad extending between Spokane, Washington and Seattle, Washington, Seattle, Washington and Portland, Oregon, and Seattle, Washington and Vancouver, British Columbia.

That he has been informed and believes that an action has been commenced by said Edward T. Hyde in the United States District Court for the District of Minnesota in the City of St. Paul, Minnesota, against Great Northern Railway Company to recover damages arising out of injuries alleged to have been received by said Edward T. Hyde in an accident at Seattle, Washington, on November 5, 1955, while working as a switch foreman for the Great Northern Railway Company.

Affiant further states that he has been informed by Don E. Engle, one of the attorneys of record for said Great Northern Railway Company, and believes that if said case is tried at St. Paul, Minnesota, the trial of said case will consume approximately seven days and that said case will be reached for trial at St. Paul, Minnesota, if tried in said city, sometime between April 15, 1956 and May 31, 1956.

Affiant further states that he has been informed by one of defendant's attorneys, Don E. Engle, that it will be necessary to have available at the trial of said case the following named persons to testify on behalf of the Great Northern Railway Company:

William E. Abshur, switchman,
Robert K. Doremus, switchman,
Rene Vander Poll, engineer,
Earl W. Frank, fireman,
F. Febach, car foreman,
Charles S. Williams, assistant car foreman,
Karl R. Michelson, carman,
Carl Fredrickson, carman,
George L. Alexander, yardmaster,
Douglas Hoag, terminal trainmaster.

Affiant further states that each of the above-named persons were on November 5, 1955, and still are employed by said Great Northern Railway Company in the job classifications as set forth above and that he has jurisdiction over and supervision of each of said persons.

Affiant further states that at the present time said defendant Great Northern Railway Company employs a total of 12 carmen at the Seattle-Interbay Terminal Yards and that said jobs are assigned positions; that the total of 12 carmen includes car foreman and assistant car foreman; that the duties of said carmen, including car foreman and assistant car foreman, are to repair defective cars at said Seattle-Interbay Terminal Yards and inspect freight trains arriving and departing from said Seattle-Interbay Terminal Yards for defective cars; that said carmen, car foreman and assistant car foreman also make up the compliment of a wrecking crew in the event of an accident needing the use of a wrecking train in said Seattle-Interbay Terminal Yards.

Affiant further states that if said car foreman Febach, assistant car foreman Williams, carman Michelson and carman Fredrickson were required to be absent from their jobs at said Seattle-Interbay Terminal Yards for the trial of said case at St. Paul, Minnesota, that the present carman force would be reduced by one-third; that the absence of said four carmen would reduce the operation at said Seattle-Interbay Terminal Yards in so far as repair of defective cars by one-third during their absence and would, therefore, create a back-log of defective cars needing repairs at said Seattle-Interbay Terminal Yards; that there are no available carmen to take the place of said four carmen during their absence and that there is no extra board for carmen and no carmen are presently on furlough who can be reinstated into service; that the absence of said carmen for the attendance of said trial at St. Paul, Minnesota, would seriously inconvenience said Great Northern Railway Company and said absence would be a detriment to normal train operation on said Cascade Division.

Affiant further states that there are at the present time 104 switchmen employed by said Great Northern Railway Company at the Seattle-Interbay Terminal Yards and that there are approximately 14 switchmen on the extra board in

said yards; that said 14 switchmen on the extra board are all now working and have been working regularly for some time in the post; that there is a shortage of experienced switchmen in the Seattle-Interbay Terminal Yards and that said Great Northern Railway Company would be unable to replace switchman Abshur and switchman Doremus with replacement switchmen if said persons were required to absent themselves from their jobs for the attendance of said trial at St. Paul, Minnesota; that as of April 1, 1956, the regular vacation period for the switchmen now working at said Seattle-Interbay Yards will commence which will create an additional shortage of available switchmen.

Affiant further states that there are 12 regularly assigned yardmasters working in the Seattle-Interbay Terminal Yards and that there are five switch foremen qualified to work as yardmasters in said Seattle-Interbay Terminal Yards; that a yardmaster has supervision over switching crews; that if said yardmaster Alexander was required to absent himself from his job in said Seattle-Interbay Terminal Yards for the purpose of attending said trial at St. Paul, Minnesota, it would require that a qualified switch foreman assume said yardmaster Alexander's duties during his absence; that the assumption of said duties by a switch foreman would create an additional shortage of available switchmen at said Seattle-Interbay Terminal Yards; that the absence of yardmaster Alexander and switchmen Doremus and Abshur would seriously inconvenience and be a detriment to the normal operation of said Great Northern Railway Company at said Seattle-Interbay Terminal Yards.

Affiant further states that there are approximately 66 regular crews, 3 work train crews and 6 helper train crews operating out of the Seattle-Interbay Terminal Yards daily; that each of said crews is composed of one engineer and one fireman; that at the present time there are approximately 12 engineers and firemen which compose the extra board at said Seattle-Interbay Terminal Yards; that as of April 1,

1956, the annual vacation period for engineers and firemen will commence; that it is anticipated that from said April 1, 1956 and for several months thereafter, 10 of the engineers and firemen now holding positions on the extra board will be regularly assigned to replace vacationing engineers and firemen; that a fireman has to operate as such for three years before he can qualify to hold an engineer's position; that there is a shortage of experienced firemen and engineers on said Cascade Division and at said Seattle-Interbay Terminal Yards said shortage will become more acute commencing April 1, 1956; that it is necessary to have a number of extra engineers and firemen available in case of an emergency, and that the absence of engineer Vander Poll and fireman Frank for the period necessary for the trial of said case at St. Paul will seriously inconvenience and be a detriment to normal train operations on said Cascade Division and in particular at Seattle-Interbay Terminal Yard area.

Affiant further states that said terminal trainmaster Hoag is in charge of the 5 trainmasters on the said Cascade Division and that said terminal trainmaster Hoag, in addition, has supervision of trains on said Cascade Division and is responsible for the operation of the Seattle-Interbay Terminal Yards; that in addition, said terminal trainmaster Hoag has general supervision over work trains used in connection with the maintenance of track and right of way on said Cascade Division and that during the past month there have been several snow slides and innumerable mud slides on said Cascade Division which have seriously damaged the track and right of way of said Great Northern Railway Company on said Cascade Division; that in addition to the above enumerated duties of said terminal trainmaster Hoag, he will have general supervision over the repairing of said track and that the resurfacing and stabilizing of said track and right of way will require the work of several crews extending over several months; that said repair work has been commenced and is being carried out at the present time; that the absence of said terminal trainmaster Hoag during the

time he is required to attend the trial of said case at St. Paul, Minnesota, will cause a serious inconvenience to said Great Northern Railway Company and be a detriment to the normal operation of said railroad.

Affiant further states that because of the above-stated facts, he firmly believes that the removal of any Great Northern Railway Company's railroad employees as set forth above from its Cascade Division for a period of about 13 days to attend the trial at St. Paul, Minnesota, would seriously inconvenience the railroad in its operation on the Cascade Division; that depending on the specific circumstances within the Cascade Division at the time of said trial at St. Paul, it may be impossible because of the operating requirements of said Great Northern Railway Company to allow certain employees to leave their duties on said Cascade Division and attend the trial in St. Paul, Minnesota.

ROBERT H. SHOBER

Subscribed and sworn to before me
this 13th day of March, 1956.
J. O. Wood

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit C.)

(Title and Venue)

AFFIDAVIT OF DR. JOHN R. MULLINS

State of Washington
County of King—ss

Dr. John R. Mullins, being first duly sworn, deposes and says that he is a duly licensed physician and surgeon in the State of Washington and is practicing as such in the City of Seattle, Washington, and that he has for a number of years

in the past been so practicing in Seattle; that he is at the present time, and has for a number of years in the past, specialized his practice of medicine in the field of internal medicine and neurology; that he is acquainted with Edward T. Hyde, who resides at 4121-32nd Avenue Southwest, Seattle, Washington, and who is temporarily located at the Veterans Hospital, Long Beach, California, and states that on November 6 and November 10, 1955, he made neurological examinations of Edward T. Hyde for injuries alleged to have been received by him in an accident at Seattle, Washington, on November 5, 1955, while working as a switch foreman for the Great Northern Railway Company; that said neurological examination was made of Mr. Hyde as an employee of the Great Northern Railway Company and said examination was performed upon the request of Dr. Frederick K. Remington, local surgeon of the Great Northern Railway Company; that said examination was conducted for the purpose of diagnosis and treatment of said Edward T. Hyde.

That he has been informed and believes that an action has been commenced by said Edward T. Hyde in the United States District Court for the District of Minnesota, in the City of St. Paul, Minnesota, against Great Northern Railway Company to recover damages arising out of said injuries; that he has been informed that he will be needed as a witness at the trial of said case at St. Paul, and that it not only would be very inconvenient for him to attend the trial of said case at St. Paul, but it would be virtually impossible for him to leave his practice in the City of Seattle, Washington, for the period of time which would be required under the circumstances; that affiant has a number of personal patients who will require his personal medical attention at all times in the future; that by virtue of having to appear as a witness at St. Paul, Minnesota, he would lose a great deal of valuable time and would suffer financial loss by being absent from his practice, and that he, therefore, refuses and will continue to refuse to appear as a witness at the trial of said case at St. Paul, Minnesota.

That if this case were being tried at Seattle, Washington, he would be willing to appear as a witness at the trial, and that the trial of this case at Seattle, Washington, would not involve any appreciable loss of time or inconvenience to him and that he could continue to treat his personal patients.

JOHN R. MULLINS, M.D.

Subscribed and sworn to before me
this 7th day of March, 1956.
E. D. Brown
Notary Public

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit C.)

(Title and Venue)

AFFIDAVIT OF DR. LOUIS J. SCHIENMAN

State of Washington
County of King—ss

Dr. Louis J. Schienman, being first duly sworn, deposes and says that he is a duly licensed physician and surgeon in the State of Washington and is practicing as such in the City of Seattle, Washington, and that he has for a number of years in the past been so practicing in Seattle; that he is at the present time, and has for a number of years in the past, specialized his practice of medicine in the field of urology; that he is acquainted with Edward T. Hyde, who resides at 4121-32nd Avenue Southwest, Seattle, Washington, and who is temporarily located at the Veterans Hospital, Long Beach, California, and states that on November 14, 1955, he made a urological examination of Edward T. Hyde for injuries alleged to have been received by him in

an accident at Seattle, Washington, on November 5, 1955, while working as a switch foreman for the Great Northern Railway Company; that said urological examination was made of Mr. Hyde as an employee of the Great Northern Railway Company and said examination was performed upon the request of Dr. Frederick K. Remington, local surgeon of the Great Northern Railway Company; that said examination was conducted for the purpose of diagnosis and treatment of said Edward T. Hyde; that beginning November 14, 1955, and up until January 30, 1956, he treated said Edward T. Hyde in the capacity of an urologist for said injuries alleged to have been received by said Edward T. Hyde on November 5, 1955; that said treatment was given Mr. Hyde as an employee of the Great Northern Railway Company and was performed upon the request of said Dr. Frederick K. Remington.

That he has been informed and believes that an action has been commenced by said Edward T. Hyde in the United States District Court for the District of Minnesota, in the City of St. Paul, Minnesota, against Great Northern Railway Company to recover damages arising out of said injuries; that he has been informed that he will be needed as a witness at the trial of said case at St. Paul, and that it not only would be very inconvenient for him to attend the trial of said case at St. Paul, but it would be virtually impossible for him to leave his practice in the City of Seattle, Washington, for the period of time which would be required under the circumstances; that affiant has a number of personal patients who will require his personal medical attention at all times in the future; that by virtue of having to appear as a witness at St. Paul, Minnesota, he would lose a great deal of valuable time and would suffer financial loss by being absent from his practice, and that he, therefore, refuses and will continue to refuse to appear as a witness at the trial of said case at St. Paul, Minnesota.

That if this case were being tried at Seattle, Washington, he would be willing to appear as a witness at the trial, and that the trial of this case at Seattle, Washington, would not involve any appreciable loss of time or inconvenience to him and that he could continue to treat his personal patients.

LOUIS J. SCHIENMAN, M.D.

Subscribed and sworn to before me
this 9th day of March, 1956.
Janice Goetz
Notary Public in and for the State of
Washington, residing at Seattle.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit F.)

(Title and Venue)

AFFIDAVIT OF DR. IRA O. McLEMORE

State of Washington
County of King—ss

Dr. Ira O. McLemore, being first duly sworn, deposes and says that he is a duly licensed physician and surgeon in the State of Washington and is practicing as such in the City of Seattle, Washington, and that he has for a number of years in the past been so practicing in Seattle; that he is at the present time, and has for a number of years in the past, specialized his practice of medicine in the field of orthopedic surgery; that he is acquainted with Edward T. Hyde, who resides at 4121-32nd Avenue Southwest, Seattle, Washington, and who is temporarily located at the Veterans Hospital, Long Beach, California, and states that on December 28, 1955, he made an examination of Edward T. Hyde for

injuries alleged to have been received by him in an accident at Seattle, Washington, on November 5, 1955, while working as a switch foreman for the Great Northern Railway Company; that said examination was made of Mr. Hyde as an employee of the Great Northern Railway Company and said examination was performed upon the request of Dr. Frederick K. Remington, local surgeon of the Great Northern Railway Company; that said examination was conducted for the purpose of diagnosis and treatment of said Edward T. Hyde.

That he has been informed and believes that an action has been commenced by said Edward T. Hyde in the United States District Court for the District of Minnesota, in the City of St. Paul, Minnesota, against Great Northern Railway Company to recover damages arising out of said injuries; that he has been informed that he will be needed as a witness at the trial of said case at St. Paul, and that it not only would be very inconvenient for him to attend the trial of said case at St. Paul, but it would be virtually impossible for him to leave his practice in the City of Seattle, Washington, for the period of time which would be required under the circumstances; that affiant has a number of personal patients who will require his personal medical attention at all times in the future; that by virtue of having to appear as a witness at St. Paul, Minnesota, he would lose a great deal of valuable time and would suffer financial loss by being absent from his practice, and that he, therefore, refuses and will continue to refuse to appear as a witness at the trial of said case at St. Paul, Minnesota.

That if this case were being tried at Seattle, Washington, he would be willing to appear as a witness at the trial, and that the trial of this case at Seattle, Washington, would not

involve any appreciable loss of time or inconvenience to him and that he could continue to treat his personal patients.

IRA O. McLEMORE, M.D.

Subscribed and sworn to before me
this 9th day of March, 1956.
Frantzel Coe Lewin
Notary Public

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit C.)

(Title and Venue)

AFFIDAVIT OF DR. WOLFGANG W. KLEMPERER

State of Washington
County of King—ss

Dr. Wolfgang W. Klemperer, being first duly sworn, deposes and says that he is a duly licensed physician and surgeon in the State of Washington and is practicing as such in the City of Seattle, Washington, and that he has for a number of years in the past been so practicing in Seattle; that he is at the present time, and has for a number of years in the past, specialized his practice of medicine in the field of neuro surgery; that he is acquainted with Edward T. Hyde, who resides at 4121-32nd Avenue Southwest, Seattle, Washington, and who is temporarily located at the Veterans Hospital, Long Beach, California, and states that on November 6, 1955, he performed a decompression laminectomy and subdural exploration operation on Edward T. Hyde for the purpose of diagnosis and treatment of said Edward T. Hyde for injuries alleged to have been received by him in an accident at Seattle, Washington, on November 5, 1955,

while working as a switch foreman for the Great Northern Railway Company; that said operation was performed on Mr. Hyde as an employee of the Great Northern Railway Company and said operation was performed upon the request of Dr. Frederick K. Remington, local surgeon of the Great Northern Railway Company.

That he has been informed and believes that an action has been commenced by said Edward T. Hyde in the United States District Court for the District of Minnesota, in the City of St. Paul, Minnesota, against Great Northern Railway Company to recover damages arising out of said injuries; that he has been informed that he will be needed as a witness at the trial of said case at St. Paul, and that it not only would be very inconvenient for him to attend the trial of said case at St. Paul, but it would be virtually impossible for him to leave his practice in the City of Seattle, Washington, for the period of time which would be required under the circumstances; that affiant has a number of personal patients who will require his personal medical attention at all times in the future; that by virtue of having to appear as a witness at St. Paul, Minnesota, he would lose a great deal of valuable time and would suffer financial loss by being absent from his practice, and that he, therefore, refuses and will continue to refuse to appear as a witness at the trial of said case at St. Paul, Minnesota.

That if this case were being tried at Seattle, Washington, he would be willing to appear as a witness at the trial, and that the trial of this case at Seattle, Washington, would not involve any appreciable loss of time or inconvenience to him and that he could continue to treat his personal patients.

WOLFGANG W. KLEMPERER, M.D.

Subscribed and sworn to before me
this 9th day of March, 1956.
Janice Goetz
Notary Public in and for the State of
Washington, residing at Seattle.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit C.)

(Title and Venue)

AFFIDAVIT OF DR. PAUL E. RUUSKA

State of Washington
County of King—ss

Dr. Paul E. Ruuska, being first duly sworn, deposes and says that he is a duly licensed physician and surgeon in the State of Washington and is practicing as such in the City of Seattle, Washington, and that he has for a number of years in the past been so practicing in Seattle; that he is at the present time, and has for a number of years in the past, specialized his practice of medicine in the field of orthopedic surgery and fractures; that he is acquainted with Edward T. Hyde, who resides at 4121-32nd Avenue Southwest, Seattle, Washington, and who is temporarily located at the Veterans Hospital, Long Beach, California, and states that on November 6, 1955, he performed a reduction of a compound fracture of the left tibia and fibula by operation on said Edward T. Hyde and treated said Edward T. Hyde from the date of said operation until January 30, 1956, for injuries alleged to have been received by said Edward T. Hyde in an accident at Seattle, Washington, on November 5, 1955, while working as a switch foreman for the Great Northern Railway Company; that said operation and treatment was given Mr. Hyde as an employee of the Great Northern Railway Company and said operation and treatment was performed upon the request of Dr. Frederick K. Remington, local surgeon of the Great Northern Railway Company; that said operation was conducted for the purpose of treating said Edward T. Hyde.

That he has been informed and believes that an action has been commenced by said Edward T. Hyde in the United States District Court for the District of Minnesota, in the City of St. Paul, Minnesota, against Great Northern Railway Company to recover damages arising out of said injuries; that he has been informed that he will be needed as a witness at the trial of said case at St. Paul, and that it not only would be very inconvenient for him to attend the trial of said case at St. Paul, but it would be virtually impossible for him to leave his practice in the City of Seattle, Washington, for the period of time which would be required under the circumstances; that affiant has a number of personal patients who will require his personal medical attention at all times in the future; that by virtue of having to appear as a witness at St. Paul, Minnesota, he would lose a great deal of valuable time and would suffer financial loss by being absent from his practice, and that he, therefore, refuses and will continue to refuse to appear as a witness at the trial of said case at St. Paul, Minnesota.

That if this case were being tried at Seattle, Washington, he would be willing to appear as a witness at the trial, and that the trial of this case at Seattle, Washington, would not involve any appreciable loss of time or inconvenience to him and that he could continue to treat his personal patients.

PAUL E. RUUSKA, M.D.

Subscribed and sworn to before me
this 7th day of March, 1956.
Ray Latch
Notary Public
(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit C.)

(Title and Venue)

AFFIDAVIT OF DR. FREDERICK K. REMINGTON

State of Washington
County of King—ss

Dr. Frederick K. Remington, being first duly sworn, deposes and says that he is a duly licensed physician and surgeon in the State of Washington, and is practicing as such in the City of Seattle, Washington, and that he has for a number of years in the past been so practicing at Seattle; that he is acquainted with Edward T. Hyde, who resides at 4121 32nd Avenue Southwest, Seattle, Washington, and who is temporarily located at the Veterans Hospital, Long Beach, California, and states that beginning November 5, 1955, and up until January 30, 1956, he treated Edward T. Hyde for injuries alleged to have been received by him in an accident at Seattle, Washington, on November 5, 1955, while working as a switch foreman for the Great Northern Railway Company; that said treatment was furnished to Mr. Hyde as an employee of the Great Northern Railway Company and said treatment was given by him as a local surgeon of the Great Northern Railway Company.

That he has been informed and believes that an action has been commenced by said Edward T. Hyde in the United States District Court for the District of Minnesota, in the City of St. Paul, Minnesota, against Great Northern Railway Company, to recover damages arising out of said injuries; that he has been informed that he will be needed as a witness at the trial of said case at St. Paul, and that it not only would be very inconvenient for him to attend the trial of said case at St. Paul, but it would be virtually impossible for him to leave his practice in the City of Seattle, Washington, for the period of time which would be required under the circumstances; that affiant has a number of personal patients who will require his personal medical attention at all times

in the future; that by virtue of having to appear as a witness at St. Paul, Minnesota, he would lose a great deal of valuable time and would suffer financial loss by being absent from his practice and that he, therefore, refuses and will continue to refuse to appear as a witness at the trial of said case at St. Paul, Minnesota.

That if this case were being tried at Seattle, Washington, he would be willing to appear as a witness at the trial, and that the trial of this case at Seattle, Washington, would not involve any appreciable loss of time or inconvenience to him, and that he could continue to treat his personal patients.

FREDERICK K. REMINGTON, M.D.

Subscribed and sworn to before me
this 5th day of March, 1956.
Janice Goetz
Notary Public in and for the State of
Washington, residing at Seattle.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on March 16, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit C.)

(Title and Venue)

AFFIDAVIT OF ROBERT H. SHOBER

State of Washington
County of King—ss

Robert H. Shober, being first duly sworn, deposes and says that he is the Superintendent of the Cascade Division of the Great Northern Railway Company and that he is the same Robert H. Shober who executed an affidavit on March 13, 1956, in the action entitled Edward T. Hyde, Plaintiff v. Great Northern Railway Company, a Corporation, Defendant.

Affiant further states that he has been informed since executing said affidavit on March 13, 1956, by Don E. Engle, one of the attorneys of record for said Great Northern Railway Company, that said case entitled Edward T. Hyde, Plaintiff v. Great Northern Railway Company, a Corporation, Defendant will be reached for trial at St. Paul, Minnesota, if tried in said city, sometime shortly after November 6, 1956.

Affiant further states that if said case is tried at St. Paul, Minnesota, shortly after November 6, 1956, necessitating the absence of said persons outlined in said affidavit of March 13, 1956, from the Cascade Division, that the same serious inconvenience to said railroad and detriment to normal operation of said railroad would result as outlined in said affidavit dated March 13, 1956; that the reasons why said serious inconvenience and detriment to normal operation as outlined in said affidavit dated March 13, 1956, will in affiant's opinion exist and be present during the fall of 1956, including the period shortly after November 6, 1956; that depending on the specific circumstances within the Cascade Division at the time of said trial at St. Paul, it may be impossible because of operating requirements of said Great Northern Railway Company to allow certain employees to leave their duties on said Cascade Division and attend the trial in St. Paul, Minnesota.

ROBERT H. SHOBER

Subscribed and sworn to before me
this 20th day of April, 1956.
J. O. Wood

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on May 25, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit D.)

(Title and Venue)

AFFIDAVIT OF MILLARD P. THOMAS

State of Washington
County of King—ss

Millard P. Thomas, being first duly sworn, deposes and says that he is the Clerk of the United States District Court of the Western District of Washington, Northern Division, and that as such he is familiar with the docket and calendar of said court.

Affant further states that the United States District Court for the Western District of Washington, Northern Division, regularly sits for trial of court and jury cases at Seattle, Washington, that the fall term of court for the trial of court and jury cases at Seattle, Washington, will be held commencing the first Tuesday in November, 1956.

MILLARD P. THOMAS

Subscribed and sworn to before me
this 11th day of April, 1956.
Woodrow L. Taylor
Notary Public in and for the State of
Washington, residing at Seattle.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on May 25, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit E.)

(Title and Venue)

AFFIDAVIT OF EUGENE A. RERAT

State of Minnesota
County of Ramsey—ss

Eugene A. Rerat, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled action.

Affiant further states that the Great Northern Railway Company, a Corporation, the defendant in this action is incorporated and has its home office in the State of Minnesota wherein this action was instituted.

Affiant further states that the burden of proving the injuries is on the plaintiff to produce the testimony of the treating doctors; that the treating doctors set forth in the Affidavit of the defendant could only testify for the plaintiff and could only testify for the defendant in the event that the plaintiff waived his privilege.

Affiant further states that the plaintiff Edward G. Hyde was admitted to the Veteran's Administration Hospital, Long Beach and the plaintiff has the burden of producing these attending doctors wherever the trial may be held. Further affiant states that in his trial experience both sides supplement the testimony of treating doctors with the testimony of specialists, the expert medical testimony; that the expert testimony for both sides may be obtained as readily in Minnesota as in any other place of trial.

Affiant further states that in his opinion, the scene of the accident will be adequately covered during trial by photographs and plats that are accustomarily a part of the trial procedure.

Affiant further states that this Affidavit is made in opposition to a Motion to transfer this action to the United States

District Court, District of Washington for trial at Seattle, Washington.

Dated at Minneapolis, Minnesota,
this 24th day of May, 1956.

EUGENE A. RERAT

Subscribed and sworn to before me
this 24th day of May, 1956.
Paul F. Clements
Notary Public, Hennepin County, Minn.
My commission expires Nov. 19, 1960.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit F.)

(Title and Venue)

AFFIDAVIT OF JUNE ROSE HYDE

State of Washington
County of King—ss

June Rose Hyde, being first duly sworn on oath deposes and says:

That she is the wife of Edward T. Hyde, the plaintiff herein, who was injured while working for the Great Northern Railway Company on November 6, 1955, and as a result of said injuries received said Edward T. Hyde is paralyzed from the waist down;

That on the date of the accident, November 6, 1955, she was living with her said husband, the plaintiff herein, in the City of Seattle, State of Washington; that from November 6, 1955, until January 30, 1956, her said husband was confined in the hospital at Seattle, Washington, and that during this period of time her said husband was under

the care and supervision of Dr. Remington, Great Northern Railway Company doctor;

That prior to January 30, 1956, said Dr. Remington recommended and made arrangements for her said husband to enter the Veterans' Hospital at Long Beach, California; that said Dr. Remington recommended this hospital for treatment of the injuries her said husband received on November 6, 1955; that said Dr. Remington made all arrangements for her said husband, Edward T. Hyde to enter this hospital; that a Mr. Rottweiler, Claim Agent for the Great Northern Railway Company, brought papers to the hospital in Seattle for her said husband to be filled out in order that he could enter said Veterans' Hospital at Long Beach, California;

That since February 1, 1956, affiant's husband, Edward T. Hyde, has been a patient in the Veterans' Hospital at Long Beach, California, and expects to remain there for several more months; that during his stay in this hospital he is being treated by a large number of doctors and hospital attendants;

Affiant states that upon arriving at Long Beach, California, she and her said husband decided to make California their home and to become residents of the State of Calfornia; and that since February 1, 1956, Long Beach, California, has been their home and that they intend to live in Long Beach, California, permanently.

Affiant further states that at the present time she is in the City of Seattle, Washington, for the express purpose of making arrangements to sell their home in Seattle, Washington; that they do not intend to make their residence in the State of Washington, but that they are now and will permanently continue to be residents of the State of California;

That the doctors and other hospital attendants who are treating and taking care of her husband, Edward T. Hyde,

and who have been treating her husband since February 1, 1956, and who will continue to treat her said husband at the Veterans' Hospital at Long Beach, California, until he is discharged, she believes will not voluntarily leave Long Beach, California, and travel to the City of Seattle, Washington, for the purpose of giving testimony, and it is her belief that these numerous witnesses cannot be subpoenaed to appear if her husband's case is tried in the City of Seattle, Washington.

Affiant further states that because of the injuries her husband received on November 6, 1955, it is very difficult for him to travel and that it would be much better if the trial of his case could be had in the City of Los Angeles, California; that this affiant and her husband, Edward T. Hyde, would prefer that the case be tried in St. Paul, Minnesota, for the reason that when her said husband is discharged from the Veterans' Hospital in Long Beach, it is her intention to bring him to the State of Minnesota for medical examinations and further treatment, and your affiant feels that if the case cannot be tried in the City of St. Paul, State of Minnesota, that it would be more convenient for her said husband if the case could be transferred to the State of California.

JUNE ROSE HYDE

Subscribed and sworn to before me
by the said June Rose Hyde this
31st day of May, 1956.
Owen A. Johnson
Notary Public in and for
King County, Washington

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit H.)

(Title and Venue)

NOTICE OF ALTERNATIVE MOTION

To: The defendant, Great Northern Railway Company, a Corporation, and its attorneys, J. R. Walker and Don E. Engle:

PLEASE TAKE NOTICE:

That comes now the plaintiff, and as an alternative motion to the motion of the defendant for an order under the provisions of Section 1404(a) transferring the above entitled cause from the United States District Court, District of Minnesota, Third Division, to the United States District Court, District of Washington for trial at Seattle, Washington, that the plaintiff will oppose the transfer of said case from St. Paul, Minnesota, and in the alternative will move the above Court, that in the event that the Court determines that the United States District Court, said District of Minnesota, Third Division, sitting at St. Paul, Minnesota is not a proper venue for the trial of said cause, and only in that event, that the Court make its Order transferring said cause to the Fnited States Distict Court for the Northern District of California, Southern Division, sitting at San Francisco, California.

That said alternative motion will be made and heard at the above Court on the 20th day of July, 1956, at 10:00 o'clock A.M. on that day, or as soon thereafter as counsel can be heard, at the Federal Courts Building, in the City of St. Paul, that said motion will be based upon the affidavits of June Rose Hyde and Eugene A. Rerat heretofore filed in said cause, and upon the affidavit of Eugene A. Rerat hereto attached and the pleadings, files and records herein.

Dated this 12th day of July, 1956.

EUGENE A. RERAT
Attorney for Plaintiff
610 Baker Building
Minneapolis, Minnesota

(Filed in the United States District Court, District of Minnesota, Third Division, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit O.)

(Title and Venue)

AFFIDAVIT OF EUGENE A. RERAT

State of Minnesota
County of Ramsey—ss

Eugene A. Rerat, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled cause.

Further affiant states that on July 11th, 1956 he made telegraphic inquiry of the Office of the Secretary of State of the State of California as to the city which the defendant had designated as its principal place of business in the State of California and the name and address of the agent which the defendant had designated for the service of process in said State.

Affiant further states that in response to his said inquiry he, on July 12, 1956, received a telegraphic reply from Frank M. Jordan, Secretary of State for the State of California informing affiant that Certificate filed pursuant to Section 6409 of the California Code the defendant had designated 209 Monadnack Building, San Francisco as its principal office and designated Chaffee E. Hall, Room 1200, 351 California Street, San Francisco, as its agent for the service of process in said state. That copies of such telegraphic messages are hereto attached.

That this affidavit is made in opposition to defendant's motion and in support of plaintiff's alternative.

EUGENE A. RERAT
Attorney for Plaintiff
610 Baker Building
Minneapolis, Minnesota

Subscribed and sworn to before me
this .... day of July, 1956.
Eleanor Colby
Notary Public, Hennepin County, Minn.
My commission expires Dec. 2, 1956.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit O.)

(Title and Venue)

AFFIDAVIT OF R. W. PLUNKETT

State of Minnesota
County of Ramsey—ss

R. W. Plunkett, being first duly sworn, deposes and says that he is General Claims Attorney of the Great Northern Railway Company and is the same R. W. Plunkett who executed an affidavit March 5, 1956, in support of a motion to change the venue of the above-entitled action from St. Paul, Minnesota, to Seattle, Washington.

Affiant further states that this affidavit is made in opposition to a change of venue of said action from St. Paul, Minnesota, to San Francisco, California.

Affiant further states that if the above-entitled action is tried at San Francisco, California, that each of the nineteen witnesses from Seattle, Washington, set forth in your affiant's affidavit dated March 9, 1956, will be compelled

to travel approximately 904 miles to the place of trial and a like distance to return to their homes, whereas if said action is tried at Seattle, Washington, each of the said nineteen witnesses will have to travel only two or three miles to the place of trial; that each of these nineteen persons would have to spend two and one-half additional days and three additional nights in additional travel time.

Affiant has been informed by Don E. Engle, one of the attorneys of record for the Great Northern Railway Company, and believes that if said case is tried at San Francisco, California, that it would be necessary for each of the nineteen witnesses to remain at the trial of said action throughout, and your affiant has been informed by said Don E. Engle and believes that said trial will last seven days; that affiant has also been informed by said Don E. Engle and believes that if said case is tried at Seattle, Washington, that each of the above nineteen witnesses would not be forced to remain in attendance throughout the entire trial of the entire case, but could be released to return to their work as soon as they have completed their testimony.

Affiant states that in connection with his duties as an employee of the railway company he has had to reimburse other employees for their expenses and arrange for reimbursement of time lost in connection with other cases and that he is familiar with the cost thereof; that if this case is tried at San Francisco, California, rather than at Seattle, Washington, the additional cost to the defendant, assuming a seven day trial, would be $3,974.79; that said additional cost will

be composed of items and amounts as shown on Exhibit "A" attached hereto and made a part hereof.

R. W. PLUNKETT

Subscribed and sworn to before me
this 26th day of July, 1956.
Lenore F. Cadrow
Notary Public, Ramsey County, Minn.
My commission expires June 22, 1963.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on July 28, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit P.)

EXHIBIT "A"

Name	Additional Travel Time	Additional Time Attending Trial at San Francisco	Pay for Eight Hours	Eleven and One-Half Days Additional Living Expenses	One-Half Pullman Fare	Total Additional Expenses
Wm. E. Abshur	2½	7	$18.15	$115.00	$27.85	$278.98
Robt. K. Doremus	2½	7	$18.15	$115.00	$27.85	$278.98
Rene Vander Pool	2½	7	$18.71	$115.00	$27.85	$283.18
Earl W. Frank	2½	7	$15.87	$115.00	$27.85	$261.88
F. Febach	2½	7	$22.27	$115.00	$27.85	$309.88
Charles S. Williams	2½	7	$20.22	$115.00	$27.85	$294.50
Karl R. Michelson	2½	7	$15.91	$115.00	$27.85	$262.18
Carl Fredrickson	2½	7	$15.91	$115.00	$27.85	$262.18
Geo. L. Alexander	2½	7	$22.89	$115.00	$27.85	$314.53
G. R. Osborne	2½	7	$ —	$115.00	$27.85	$142.85
A. W. Rottweiler	2½	7	$ —	$115.00	$27.85	$142.85
S. J. Markle	2½	7	$ —	$115.00	$27.85	$142.85
Elton L. Conaway	2½	7	$ —	$115.00	$27.85	$142.85
R. J. Turk	2½	7	$ —	$115.00	$27.85	$142.85
Walter Fitzgerald	2½	7	$ —	$115.00	$27.85	$142.85
D. D. Hoag	2½	7	$ —	$115.00	$27.85	$142.85
Einar Johnson	2½	7	$ —	$115.00	$27.85	$142.85
Elmer Doty	2½	7	$ —	$115.00	$27.85	$142.85
W. E. Brough	2½	7	$ —	$115.00	$27.85	$142.85
						$3974.79

(Title and Venue)

AFFIDAVIT OF A. W. ROTTWEILER

State of California
County of Los Angeles—ss

A. W. Rottweiler, being first duly sworn, deposes and says that he is a District Claim Agent of the Great Northern Railway Company and as such he is stationed at Seattle, Washington.

Affiant further states that he investigated the accident involving Edward T. Hyde which occurred at Seattle, Washington, on November 5, 1955, while said Edward T. Hyde was working as a switch foreman for the Great Northern Railway Company.

Affiant further states that he accompanied said Edward T. Hyde from Seattle, Washington, to Long Beach, California, via railroad train when said Edward T. Hyde was transferred from a hospital at Seattle, Washington, to the Veterans' Administration Hospital at Long Beach, California, on January 30, 1956.

Affiant further states that he personally observed the said Edward T. Hyde during the time that said Edward T. Hyde traveled from Seattle, Washington, to Long Beach, California, and said Edward T. Hyde did not appear to evidence any discomfort or pain as a result of said travel, but rather said Edward T. Hyde was in a jovial, content and restful mood during said travel.

A. W. ROTTWEILER

Subscribed and sworn to before me
this 19th day of July, 1956.
Esther Yaussi
Notary Public in and for the County
of Los Angeles, State of California.
My commission expires Feb. 23, 1957.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on July 28, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit B.)

(Title and Venue)

AFFIDAVIT OF DR. FREDERICK K. REMINGTON

State of Washington
County of King—ss.

Dr. Frederick K. Remington, being first duly sworn, deposes and says that he is the same Frederick K. Remington who executed affidavits on March 5, 1956, and March 23, 1956, in the action entitled Edward T. Hyde, plaintiff, v. Great Northern Railway Company, a Corporation, defendant.

Affiant further states that beginning November 5, 1955, and up until January 30, 1956, he treated Edward T. Hyde for injuries alleged to have been received by him in an accident at Seattle, Washington, on November 5, 1955, and that as a result of said injuries said Edward T. Hyde is a paraplegic and that as of January 30, 1956 in the early stages of convalescence and rehabilitation.

Affiant further states that upon your affiant's recommendations and with your affiant's consent and approval said Edward T. Hyde was permitted to be transferred from a hospital at Seattle, Washington, to the Veterans' Administration Hospital, Long Beach, California, for further treatment and rehabilitation of said Edward T. Hyde's physical injuries.

Affiant further states that as of January 30, 1956, the date said Edward T. Hyde was transferred to the Veterans' Administration Hospital, Long Beach, California, that said Edward T. Hyde's physical condition was such that he

could travel either by railroad or air line from Seattle, Washington, to Long Beach, California, accompanied by a competent registered nurse, without substantial pain or discomfort to said Edward T. Hyde and without materially affecting the physicial condition of said Edward T. Hyde as a result of said travel.

Affiant further states that in his opinion said Edward T. Hyde at the present time could travel by railroad or air line from Long Beach, California, to Seattle, Washington, accompanied by a competent registered nurse, without substantial pain or discomfort to said Edward T. Hyde and without materially affecting the physical condition of said Edward T. Hyde as a result of said travel, assuming that said Edward T. Hyde's physical condition has not been changed as a result of complications unknown to your affiant.

FREDERICK K. REMINGTON, M.D.

Subscribed and sworn to before me
this 23rd day of July, 1956.
Janice Goetz
Notary Public in and for the State of
Washington, residing at Seattle.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on July 28, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit P.)

(Title and Venue)

AFFIDAVIT OF DR. A. ESTIN COMARR

State of California
County of Los Angeles—ss

Dr. A. Estin Comarr, being first duly sworn, deposes and says that he is a duly licensed physician and surgeon in the

State of California, and is a member of the medical staff of the Veterans' Administration Hospital at Long Beach, California, and is the Assistant Chief Paraplegia of said medical staff.

Affiant further states that he is acquainted with Edward T. Hyde, and that said Edward T. Hyde is at the present time a patient at the Veterans' Administration Hospital at Long Beach, California, and that the medical care and treatment of said Edward T. Hyde is bing performed by your affiant in conjunction with and under the supervision and direction of Dr. Ernest H. Bors.

Affiant further states that he has been informed and believes that an action has been commenced by said Edward T. Hyde in the United States District Court for the District of Minnesota in the City of St. Paul, Minnesota, against the Great Northern Railway Company to recover damages for injuries alleged to have been received by said Edward T. Hyde in an accident at Seattle, Washington, on November 5, 1955, which accident resulted in said Edward T. Hyde becoming a paraplegic; that he has been informed that he will be needed as a witness at the trial of said case and that said case may be set for trial at San Francisco, California.

Affiant further states that it would not only be very inconvenient for him to attend the trial of said case at San Francisco, but it would be virtually impossible for him to leave his practice at the Veterans' Administration Hospital, in the City of Long Beach, California, for the period of time which would be required under the circumstances; that affiant has a number of patients who will require his personal medical attention at all times in the future and that he would lose a great deal of valuable time and therefore re-

fuses and will continue to refuse to appear voluntarily as a witness at the trial of said case at San Francisco, California.

A. ESTIN COMARR, M.D.

Subscribed and sworn to before me
this 25th day of July, 1956.
Loren M. Heft
Notary Public in and for the County
of Los Angeles, State of California.
My commission expires Feb. 14, 1959.

(Superior Court Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on July 28, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit P.)

(Title and Venue)

AFFIDAVIT OF DR. HARRIS W. KNUDSON

State of California
County of Los Angeles—ss

Dr. Harris W. Knudson, being first duly sworn, deposes and says that he is a duly licensed physician and surgeon in the State of Minnesota, and is a member of the medical staff of the Veterans' Administration Hospital at Long Beach, California, and is a ward physician in said hospital.

Affiant further states that he is acquainted with Edward T Hyde, and that said Edward T. Hyde is at the present time a patient at the Veterans' Administration Hospital at Long Beach, California, and that the said medical care and treatment of said Edward T. Hyde is being performed by your affiant in conjunction with and under the supervision and direction of Dr. Ernest H. Bors.

Affiant further states that he has been informed and believes that an action has been commenced by said Edward

T. Hyde in the United States District Court for the District of Minnesota in the City of St. Paul, Minnesota, against the Great Northern Railway Company to recover damages, for injuries alleged to have been received by said Edward T. Hyde in an accident at Seattle, Washington, on November 5, 1955, which accident resulted in said Edward T. Hyde becoming a paraplegic; that he has been informed that he will be needed as a witness at the trial of said case and that said case may be set for trial at San Francisco, California.

Affiant further states that it would not only be very inconvenient for him to attend the trial of said case at San Francisco but it would be virtually impossible for him to leave his practice at the Veterans' Administration Hospital, in the City of Long Beach, California, for the period of time which would be required under the circumstances; that affiant has a number of patients who will require his personal medical attention at all times in the future and that he would lose a great deal of valuable time and therefore refuses and will continue to refuse to appear voluntarily as a witness at the trial of said case at San Francisco, California.

HARRIS W. KNUDSON, M.D.

Subscribed and sworn to before me
this 20th day of July, 1956.
Jessie Kipper
Notary Public in and for the County
of Los Angeles, State of California.
My commission expires July 29, 1959.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on July 28, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit P.)

(Title and Venue)

AFFIDAVIT OF DR. ERNEST H. BORS

State of California
County of Los Angeles—ss

Dr. Ernest H. Bors, being first duly sworn, deposes and says that he is a duly licensed physician and surgeon in the State of New York, and is a member of the medical staff of the Veterans' Administration Hospital at Long Beach, California, and is the Chief Paraplegia of said medical staff.

Affiant further states that he is acquainted with Edward T. Hyde, and that said Edward T. Hyde is at the present time a patient at the Veterans' Administration Hospital at Long Beach, California, and that the medical care and treatment of said Edward T. Hyde is being performed by your affiant or under his immediate supervision and direction.

Affiant further states that he has been informed and believes that an action has been commenced by said Edward T. Hyde in the United States District Court for the District of Minnesota in the City of St. Paul, Minnesota, against the Great Northern Railway Company to recover damages for injuries alleged to have been received by said Edward T. Hyde in an accident at Seattle, Washington, on November 5, 1955, which accident resulted in said Edward T. Hyde becoming a paraplegic; that he has been informed that he will be needed as a witness at the trial of said case and that said case may be set for trial at San Francisco, California.

Affiant further states that it would not only be very inconvenient for him to attend the trial of said case at San Francisco, but it would be virtually impossible for him to leave his practice at the Veterans' Administration Hospital, in the City of Long Beach, California, for the period of time which would be required under the circumstances; that affiant has a number of patients who will require his personal medical attention at all times in the future and that he would lose

a great deal of valuable time and therefore refuses and will continue to refuse to appear voluntarily as a witness at the trial of said case at San Francisco, California.

ERNEST H. BORS, M.D.

Subscribed and sworn to before me
this 20th day of July, 1956.
Jessie Kipper
Notary Public in and for the County
of Los Angeles, State of California.
My commission expires July 29, 1959.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on July 28, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit P.)

(Title and Venue)

SUPPLEMENTAL AFFIDAVIT OF EUGENE A. RERAT

State of Minnesota
County of Hennepin—ss

Eugene A. Rerat, being first duly sworn on oath deposes and says:

That he is the attorney for the plaintiff in the above entitled action; that in the affidavit of Robert W. Plunkett, filed herein, it is stated that it will be necessary to have all of the members of the crew at the hearing, and said affidavit also lists a number of other witnesses which it is claimed will be necessary for the defendant to call, and affiant states that it is up to the plaintiff to prove his case; that plaintiff intends to prove his case under the Federal Employers' Liability Act; that plaintiff intends to prove his case by calling the various witnesses familiar with the details of the acci-

dent which occurred on November 5, 1955; affiant further states that he intends to take depositions of witnesses who have knowledge of the manner in which this accident occurred, and affiant denies that it will be necessary to call all witnesses listed in the affidavit of Robert W. Plunkett; affiant states that these witnesses will be called and their depositions taken at which time they can testify in detail with regard to the facts concerning said accident of November 5, 1955, and affiant states that so far as other witnesses who did not witness the accident, but who can testify as to any matters which will either prove or disprove any of the issues in the case are concerned, these witnesses can also be subpoenaed and their depositions taken; affiant further states that all of these witnesses are in the employ of the Great Northern Railway Company, defendant herein, and affiant believes that if such witnesses are union members an agreement exists under which such employees will travel any place on the railroad line that the company wishes to send them, but in the event no such agreement exists, affiant believes that the employees of the defendant railroad company, if requested to do so, would willingly travel to St. Paul, Minnesota, California, or any other destination when requested by defendant for the purpose of giving testimony;

Affiant further states that insofar as the doctors who have treated the plaintiff herein are concerned, it is the burden of the plaintiff to prove the injuries he sustained and affiant intends to have all such testimony before any court and jury in whose presence this case is tried; affiant further states that such attending doctors could not be called by the defendant for the reason that they are treating doctors and their testimony would be privileged, and affiant states that all doctors whom affiant feels are material witnesses and will help the court and jury determine the extent of the injuries sustained will be available to testify; affiant further states that it is the custom and practice of the defendant in actions of this type to have doctors examine the injured party to testify as

experts, and it is the belief of affiant that it does not cost any more to have such witnesses testify in the State of California than it does to have them testify in the State of Washington, and affiant denies that it will cost defendant more money to have such witnesses testify in California than it will in Washington;

Affiant further states that in Mr. Plunkett's affidavit it is stated there are some witnesses who will testify with regard to maps and records, and affiant states that these records are such that such depositions of these witnesses can be taken without prejudice to defendant;

Affiant further states that so far as photographs are concerned, affiant intends to furnish photographs showing the yards with the proper measurements in order that the court and jury will be able to understand in detail the place where this accident occurred;

Affiant further states that in the twenty-five (25) years he has been trying cases under the Federal Employers' Liability Act, he cannot recall ever having tried a case where a defendant railroad company called nineteen (19) witnesses, or anywhere near such number of witnesses;

Further, affiant states that if this action is tried in San Francisco all witnesses who testify for the defendant and are in the employ of the defendant, need not be away from their employment for more than one day;

Further, affiant states that the State of California is the proper place for this action to be tried; that the plaintiff is paralyzed; that he was sent to Long Beach, California for hospitalization and treatment, and that all such arrangements were made by the claim department of the defendant Great Northern Railway Company, a corporation, and that plaintiff has been at Long Beach, California, since January 30, 1956, and that the major part of his treatment for injuries sustained has been in the State of California; that the

doctors who have been and who are attending him and treating him, and the various nurses and attendants and therapists and other hospital attendants, who will testify as to the injuries plaintiff received and the permanent effects thereof, are located in the State of California and can be subpoenaed, and affiant believes that it will cost less money to have such witnesses subpoenaed to testify in Federal Court in San Francisco, California, than it will to bring them to the Federal Court in Seattle, Washington;

Further affiant states that the plaintiff herein and his wife have sold their home and property in Seattle, Washington, and are now residents of the State of California, and have stated to affiant that it is their intention to live in the State of California permanently, and affiant believes plaintiff is entitled to have his case tried in the State of California where he is a resident and citizen, and in which state the defendant, Great Northern Railway Company, a corporation, is doing business and has designated the City of San Francisco as its principal place of doing such business in that State of California;

Affiant further states that because of the physical condition of the plaintiff herein, it would impose a severe hardship upon him if he were forced to travel to the State of Washington for the trial of this action, and further it would impose an extreme and unjust financial burden upon the plaintiff herein if he were forced to travel to the State of Washington for the trial of this action, and affiant believes that because of plaintiff's unusual physical handicaps, he should be permitted to have his case tried in the State of California,

and that it would be fair and proper that this Court allow plaintiff's alternative motion.

EUGENE A. RERAT

Subscribed and sworn to before me
this 26th day of July, 1956.
Eleanor Colby
Notary Public, Hennepin County, Minn.
My commission expires Dec. 2, 1956.

(Notarial Seal)

(Filed in the United States District Court, District of Minnesota, Third Division on July 28, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit R.)

(Title and Venue)

ORDER FOR CHANGE OF VENUE

The above cause came on for hearing before this Court at a special term thereof on July 31, 1956, upon the petition of the defendant, Great Northern Railway Company, for a rehearing of its motion for an Order transferring said cause from the above Court to the United States District Court for the Western District of Washington, sitting at Seattle, and upon the plaintiff's motion in the alternative that in the event the Court determined that said cause should not be tried in the United States District Court of the District of Minnesota, Third Division, sitting at St. Paul, Minnesota, for an Order transferring said cause to the United States District Court for the Northern District of California, Southern Division, sitting at San Francisco, California, and the Court having considered said motions and the affidavits presented in support thereof and all the files, records and proceedings in said cause,

IT IS ORDERED:

That the said motion of the defendant be, and the same is, hereby denied, and that said motion of plaintiff be, and the same is, hereby granted and the above-entitled cause is hereby transferred from the United States District Court for the District of Minnesota, Third Division, sitting at St. Paul, Minnesota, to the United States District Court for the Northern District of California, Southern Division, sitting at San Francisco, California.

Dated this 2nd day of August, 1956 at St. Paul, Minnesota.

By the Court:
ROBERT C. BELL
United States District Judge

(Filed in the United States District Court, District of Minnesota, Third Division on August 2, 1956, attached to Defendant's Petition for Writs of Prohibition and Mandamus and marked Exhibit T.)

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

EDWARD T. HYDE,
Plaintiff-Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant-Relator.

PETITION FOR WRITS OF PROHIBITION AND MANDAMUS

To the Honorable Judges of the United States Court of Appeals, Eighth Circuit:

Comes now the Great Northern Railway Company, a corporation, by Edwin C. Matthias, Anthony Kane and Don E. Engle, and by leave of the court first had and obtained, files this, its petition for a writ of prohibition and for a writ of mandamus, against the Honorable Robert C. Bell, District Judge of the United States District Court, District of Minnesota, and the other judges and officers of the United States District Court, District of Minnesota, and respectfully represents:

I.

That your petitioner is a corporation duly organized and existing under the laws of the State of Minnesota and as such is engaged in business in this state, the State of Washington and other states unnecessary to herein mention as a common carrier by rail engaged in interstate commerce between such states.

II.

That as such petitioner owned, operated and maintained during all the times herein mentioned certain yards, tracks, engines, cars and other facilities and appurtenances at Seattle, Washington.

III.

That the plaintiff Edward T. Hyde claims to have received injuries resulting from the negligence of the defendant while he was working as a switch foreman in said interstate commerce in defendant's yard at Seattle, Washington, on or about November 5, 1955.

IV.

That on February 23, 1956, plaintiff commenced an action under the Federal Employers Liability Act (45 U.S.C. Sections 51-60) in the United States District Court for the District of Minnesota, Third Division, against this defendant to recover Four Hundred Seventy-Five Thousand Dollars ($475,000.00) as and for damages for said injuries. That

thereafter defendant answered the complaint in said action and moved the said court to transfer the venue of said action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, under the provisions of Section 1404(a) of the Judicial Code of the United States. That thereafter plaintiff moved the said court, in the alternative, in the event the court determined that said action should not be tried in the United States District Court, District of Minnesota, Third Division, for an order transferring the venue of said action to the United States District Court for the Southern District of California, Central Division, sitting at Los Angeles, California. That on June 20, 1956, said court entered and filed its order denying the motion of the defendant and granting the motion of the plaintiff, and the Clerk of said Court, pursuant to said order, transferred said action to the United States District Court, Southern District of California, Central Division.

V.

That on June 26, 1956, defendant moved said court for an order staying the effect of the court's order dated June 20, 1956, transferring the above-entitled action to the United States District Court for the Southern District of California, Central Division. That said motion was granted and the Honorable Robert C. Bell entered and filed an order dated June 26, 1956, granting the relief as prayed. That thereafter, on July 2, 1956, the defendant moved the United States District Court for the Southern District of California, Central Division, for an order transferring the venue of this action to the United States District Court, District of Minnesota, Third Division, and on July 3, 1956, the court entered and filed its order granting the relief as prayed in the defendant's motion. That thereafter the defendant petitioned the court for a rehearing of the defendant's motion to transfer the venue of this action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, and the said court entered and filed on July 10, 1956, its order granting the defendant's petition for rehearing.

VI.

That thereafter on July 12, 1956, plaintiff moved the said court that in the event that the court determines that the United States District Court, District of Minnesota, Third Division, was not a proper venue for the trial of this action, that the court make its order transferring said action to the United States District Court for the Northern District of California, Southern Division, sitting at San Francisco, California.

VII.

That said petition for rehearing and said alternative motion were duly argued to and heard by said court, the Honorable Robert C. Bell presiding, on the 31st day of July, 1956. Thereafter, on August 2, 1956, the United States District Court for the District of Minnesota, Third Division, Robert C. Bell, Judge, entered and filed its order denying defendant's motion to transfer the venue of said action to the United States District Court for the Western District of Washington, sitting at Seattle, Washington, and granted plaintiff's motion, in the alternative, to transfer the venue of said action to the United States District Court for the Northern District of California, Southern Division, sitting at San Francisco, California.

VIII.

That defendant's motion to transfer the venue of said action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, was based upon Section 1404(a) of the United States Judicial Code which provides:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any action to any other district or division where it might have been brought."

IX.

That said motion was based upon affidavits establishing the following facts:

(1) The plaintiff at the time of the accident resided and was employed at Seattle, Washington, which is approximately 1,783 miles from St. Paul, Minnesota, via the Great Northern Railroad, the shortest line of railroad between the two places.

(2) The plaintiff from the date of the accident until January 30, 1956, was hospitalized at Seattle, Washington, and was treated by six medical specialists who reside at Seattle, Washington.

(3) That the plaintiff was transferred to the Veterans' Administration Hospital at Long Beach, California, January 30, 1956, for treatment and rehabilitation and has been and still is a patient at said hospital since said date.

(4) That a total of nineteen persons and six medical specialists who would be necessary and material witnesses at the trial of this case reside in Seattle, Washington.

(5) That the defendant would have to produce said nineteen persons as witnesses at the trial of this case; that said nineteen persons do not include the six medical specialists who attended the plaintiff at Seattle, Washington, who would refuse to leave Seattle, Washington, to testify at the trial of this case if said case were not tried at Seattle, Washington.

(6) That each of said nineteen witnesses would have to spend two and one-half days additional travel time and seven additional days attending the trial of this action if said action were tried at San Francisco, California.

(7) That the additional cost to defendant to try this case at San Francisco, California, rather than at Seattle, Washington, would be Three Thousand Nine Hundred Seventy-Four and 79 100 Dollars ($3,974.79).

(8) That San Francisco, California, is approximately 904 miles from Seattle, Washington, via the shortest line of railroad.

(9) That the United States District Court, Western District of Washington, sits at Seattle, Washington, and that the next term of said court will be held commencing November 6, 1956.

(10) That to require said nineteen witnesses to attend the trial of said action at a place other than Seattle, Washington, would seriously inconvenience the railroad in its operation and that depending upon the specific circumstances existing at the time of said trial, it may be impossible because of operating requirements to allow certain of said nineteen witnesses to leave their duties with the defendant and attend the trial of said action if tried other than at Seattle, Washington.

X.

That the plaintiff traveled via railroad from Seattle, Washington, to Long Beach, California, on January 30, 1956, and did not evidence any discomfort or pain as a result of said travel, and that at the present time said plaintiff could travel by railroad or air line from Long Beach, California, to Seattle, Washington, accompanied by a nurse, without substantial pain or discomfort and without affecting the physical condition of said plaintiff as a result of said travel.

XI.

That the attending physicians of the plaintiff at the Veterans' Administration Hospital, Long Beach, California, would refuse to appear at San Francisco, California, to testify.

XII.

That the use of depositions to present medical or other testimony is an unsatisfactory means of presenting such evidence to a jury.

XIII.

That plaintiff's opposing affidavits stated that plaintiff would claim a privilege as to the six attending physicians residing at Seattle, Washington; and that the plaintiff is now a resident of the State of California.

XIV.

The pleadings referred to herein are attached hereto and made a part hereof as follows:

Exhibit A — Summons and Complaint

Exhibit B — Answer

Exhibit C — Defendant's Notice of Motion for an Order under the Provisions of Section 1404(a) of the Judicial Code of the United States Transferring the Venue of the Action to the United States District Court, District of Washington, sitting at Seattle, Washington, and Supporting Affidavits

Exhibit D — Supplemental Supporting Affidavit of Robert H. Shober

Exhibit E — Supplemental Supporting Affidavit of Millard P. Thomas

Exhibit F — Opposing Affidavit of Eugene A. Rerat dated May 24, 1956

Exhibit G — Defendant's Memorandum Brief

Exhibit H — Opposing Affidavit of June Rose Hyde dated May 31, 1956

Exhibit I — Plaintiff's Memorandum Brief

Exhibit J — Notice of Order and Order for Change of Venue to United States District Court, Southern District of California, Central Division

Exhibit K — Motion for Entry of Stay of Order, Supporting Affidavit and Order

Exhibit L — Motion for Order and Supporting Affidavits to Transfer the Venue to United States District Court, District of Minnesota, Third Division

Exhibit M — Order Transferring Venue to United States District Court, District of Minnesota, Third Division

Exhibit N — Order Granting Defendant's Petition for Rehearing and Petition for Rehearing

Exhibit O — Plaintiff's Notice of Alternative Motion

Exhibit P — Defendant's Opposing Affidavits to Transfer of Venue to United States District Court, Northern District of California, Southern Division, sitting at San Francisco

Exhibit Q — Defendant's Opposing Affidavits to Transfer to United States District Court, Southern District of California, Central Division, sitting at Los Angeles

Exhibit R — Supplemental Affidavit of Eugene A. Rerat

Exhibit S — Defendant's Memorandum Brief

Exhibit T — Notice of Order and Order for Change of Venue to the United States District Court, Northern District of California, Southern Division.

XV.

That by reason of the foregoing facts and upon all the files and proceedings herein, the United States District Court, District of Minnesota, Third Division, and the Honorable Robert C. Bell, abused its discretion to deny defendant's said motion and to grant plaintiff's said alternative motion.

XVI.

That this petition for a writ of mandamus and for a writ of prohibition is made to this court for the reason that no statutory appeal lies from the said order of the United States District Court, District of Minnesota, Third Division, granting plaintiff's alternative motion to transfer the venue of said action to the United States District Court, Northern District of California, Southern Division, sitting at San Francisco, California, under Section 1404(a) of the United States Judicial Code, and denying defendant's motion to transfer the venue of said action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, and that your petitioner has no plain, speedy or adequate remedy in the ordinary course of law since the denial of such an intermediate order is not appealable; that the trial of this case at San Francisco, California, would impose an unreasonable burden and expense on this defendant and it would be inconvenient to this defendant and to nineteen witnesses and would harass this defendant and would tend to defeat the interests of justice and deprive this defendant of a fair trial; that the administration of orderly justice would not be served upon the trial of this case on the merits at San Francisco, California, and by a reversal of any judgment that might result therefrom on the grounds that the United States District Court, District of Minnesota, Third Division, erred in granting plaintiff's alternative motion and denying this defendant's motion to transfer the venue of this action to the United States District Court, Western District of Washington, sitting at Seattle, Washington.

XVII.

That your petitioner has not made any other application for the relief prayed for herein.

WHEREFORE, your petitioner prays this Honorable Court:

(1) That a writ of prohibition issue out of and under the seal of this court directed to the Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, commanding said court and the officers thereof to refrain from taking any action under said order granting plaintiff's alternative motion transferring the venue of this action to the United States District Court, Northern District of California, Southern Division, and to refrain from transferring the venue of this action to the United States District Court, Northern District of California, Southern Division; and

(2) That pending issuance of its absolute writ of prohibition as prayed for an alternative writ of prohibition issue commanding said court to refrain from transferring the venue of this action to the United States District Court, Northern District of California, Southern Division, sitting at San Francisco, California, and from any further action in said proceeding until the further order of this court, or to appear before this court at a time and place to be specified in said writ, then and there to show cause before this court why the absolute writ of prohibition should not issue as prayed for; and

(3) That a peremptory writ of mandamus issue out of and under the seal of this court directed to the Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, commanding said court to set aside its order granting plaintiff's alternative motion transferring the venue of this action to the United States District Court, Northern District of California, Southern Division, and to set aside its order denying said motion to transfer the venue of this action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, and further commanding said court to enter its order granting said motion as prayed transferring the venue of this action to the United States District Court, Western District of Washington, sitting at Seattle, Washington; and

(4) That pending issuance of its peremptory writ of mandamus as prayed for an alternative writ of mandamus issue

commanding said court to set aside its order granting plaintiff's alternative motion transferring the venue of this action to the United States District Court, Northern District of California, Southern Division, and to set aside its order denying said motion to transfer the venue of this action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, and further commanding said court to enter its order granting said motion as prayed transferring the venue of this action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, or to appear before this court at a time and place to be specified in said writ, then and there to show cause why it has not performed said act and duty and why a peremptory writ of mandamus should not issue from this court commanding and requiring performance of said act and duty; and

(5) Your petition further prays that this court in its order to show cause direct and order that until the further order of this court all proceedings in the United States District Court, District of Minnesota, Third Division, in the above-entitled action be stayed; and

(6) That this matter be set down for oral argument after the return to the alternative writs are served and filed; and

(7) That relator have such other additional and further relief as may be just and proper in the premises.

Dated this 6th day of August, 1956.

GREAT NORTHERN RAILWAY COMPANY

By EDWIN C. MATTHIAS
Vice President and General Counsel

EDWIN C. MATTHIAS
ANTHONY KANE
DON E. ENGLE
Attorneys for Defendant-Relator
175 East Fourth Street
St. Paul 1, Minnesota

State of Minnesota
County of Ramsey—ss:

EDWIN C. MATTHIAS, being first duly sworn, deposes and says that he is Vice President and General Counsel of Great Northern Railway Company; that he has read the above petition and that the matters therein stated are true to the best of his knowledge and belief.

EDWIN C. MATTHIAS

Subscribed and sworn to before me
this 6th day of August, 1956.
Lenore F. Cadow
Notary Public, Ramsey County, Minn.
My commission expires June 22, 1963.

(Notarial Seal)

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

EDWARD T. HYDE,
Plaintiff-Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant-Relator.

ORDER DIRECTING ISSUANCE OF ALTERNATIVE WRIT OF PROHIBITION AND ALTERNATIVE WRIT OF MANDAMUS

On the verified petition of the relators above named and on motion of Edwin C. Matthias, Anthony Kane and Don E. Engle, attorneys for said relators,

IT IS ORDERED that an alternative writ of prohibition issue, directed to the Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, commanding

(a) that said court and the officers thereof refrain from taking any action under said order granting plaintiff's alternative motion transferring the venue of the action entitled

"Edward T. Hyde,
Plaintiff,

vs.

Great Northern Railway Company,
a Corporation,
Defendant"

to the United States District Court, Northern District of California, Southern Division, and refrain from transferring said action to the United States District Court, Northern District of California, Southern Division, and

(b) that said court refrain from any further action in the proceeding entitled

"Edward T. Hyde,
Plaintiff,

vs.

Great Northern Railway Company,
a Corporation,
Defendant"

until the further order of this court,

or to show cause by return to said writ served and filed on or before the 6th day of September, 1956, why said court should not be absolutely restrained in the respects mentioned above.

IT IS FURTHER ORDERED that a writ of mandamus issue, directed to the Honorable Robert C. Bell, Judge of

the United States District Court, District of Minnesota, commanding

(a) that said court set aside its order granting plaintiff's alternative motion transferring the venue of the proceeding entitled

"Edward T. Hyde,
Plaintiff,
vs.
Great Northern Railway Company,
a Corporation,
Defendant"

to the United States District Court, Northern District of California, Southern Division, and

(b) that said court set aside its order denying said motion to transfer the venue of the proceeding entitled

"Edward T. Hyde,
Plaintiff,
vs.
Great Northern Railway Company,
a Corporation,
Defendant"

to the United States District Court, Western District of Washington, sitting at Seattle, Washington, and

(c) that said court enter its order granting said motion transferring the venue of the proceeding entitled

"Edward T. Hyde,
Plaintiff,
vs.
Great Northern Railway Company,
a Corporation,
Defendant"

to the United States District Court, Western District of Washington, sitting at Seattle, Washington,

or to show cause by return to said writ served and filed on or before the 6th day of September, 1956, why said court has not performed said act and duty and why a peremptory writ of mandamus should not issue from this court commanding and requiring performance of said act and duty.

AND IT IS FURTHER ORDERED that this matter is set down for oral argument before this court on the 7th day of November, 1956, in the United States Court House and Custom House at St. Louis, Missouri, at the opening of the court on said day or as soon thereafter as counsel may be heard.

Dated August 6, 1956.

JOHN B. SANBORN
Judge of the United States
Court of Appeals, Presiding

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

EDWARD T. HYDE,
Plaintiff-Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant-Relator.

ALTERNATIVE WRIT OF PROHIBITION

To: The Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and the Other Judges and Officers of the United States District Court, District of Minnesota:

WHEREAS we have been informed by the verified petition of the relators above named that there has been an action commenced before the United States District Court, District of Minnesota, Third Division, entitled

"Edward T. Hyde,
Plaintiff,

vs.

Great Northern Railway Company,
a Corporation,
Defendant",

under the Federal Employers Liability Act (45 U.S.C. Sections 51-60) and that the United States District Court, District of Minnesota, the Honorable Robert C. Bell, Judge, entered and filed an order denying defendant's motion to transfer the venue of the proceeding entitled

"Edward T. Hyde,
Plaintiff,

vs.

Great Northern Railway Company,
a Corporation,
Defendant"

to the United States District Court, Western District of Washington, sitting at Seattle, Washington, and granted the plaintiff's alternative motion and transferred the venue of the proceeding entitled

"Edward T. Hyde,
Plaintiff,

vs.

Great Northern Railway Company,
a Corporation,
Defendant"

to the United States District Court, Northern District of California, Southern Division, and

WHEREAS it appears from said petition that the order denying the defendant's motion and granting the plaintiff's alternative motion was a clear abuse of the United States District Court's, District of Minnesota, discretion,

WE THEREFORE COMMAND the Honorable Robert C. Bell, Judge of the District Court, District of Minnesota, to refrain from transferring the venue of this proceeding to the United States District Court, Northern District of California, Southern Division, and from any further action in said proceeding until the further order of this court, or to show cause by return hereto why you should not be absolutely restrained from transferring the venue of this action to the United States District Court, Northern District of California, Southern Division. And have you then and there this writ with the return of the court thereon.

YOU ARE FURTHER NOTIFIED that this matter has been set down for oral argument before the United States Court of Appeals on the 7th day of November, 1956, in its Court Room in the United States Federal Courts Building in St. Louis, Missouri, at the opening of court on said day or as soon thereafter as counsel may be heard.

WITNESS the Honorable John B. Sanborn, Judge of the United States Court of Appeals, and the Seal thereof, this 6th day of August, 1956.

E. E. KOCH
Clerk

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

EDWARD T. HYDE,
Plaintiff-Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant-Relator.

ALTERNATIVE WRIT OF MANDAMUS

To: The Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and the Other Judges and Officers of the United States District Court, District of Minnesota:

WHEREAS it has been shown to this court by petition of Great Northern Railway Company, a corporation, as petitioner or relator, as follows:

I.

That the petitioner is a corporation duly organized and existing under the laws of the State of Minnesota, and as such is engaged in business in this state, the State of Washington and other states as a common carrier by rail and is engaged in interstate commerce between such states.

II.

That as such, petitioner owned, operated and maintained during all the times herein mentioned, certain yards, tracks, engines, cars and other facilities and appurtenances at Seattle, Washington.

III.

That the plaintiff Edward T. Hyde claims to have received injuries resulting from the negligence of the defendant while he was working as a switch foreman in said interstate commerce in defendant's yard at Seattle, Washington, on or about November 5, 1955.

IV.

That on February 23, 1956, plaintiff commenced an action under the Federal Employers Liability Act (45 U.S.C. Sections 51-60) in the United States District Court for the District of Minnesota, Third Division, against this defendant to recover Four Hundred Seventy-five Thousand Dollars ($475,000.00) as and for damages for said injuries. That thereafter defendant answered the complaint in said action and moved the said court to transfer the venue of said action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, under the provisions of Section 1404(a) of the Judicial Code of the United States. That thereafter plaintiff moved the said court, in the alternative, in the event the court determined that said action should not be tried in the United States District Court, District of Minnesota, Third Division, for an order transferring the venue of said action to the United States District Court for the Southern District of California, Central Division, sitting at Los Angeles, California. That on June 20, 1956, said court entered and filed its order denying the motion of the defendant and granting the motion of the plaintiff, and the Clerk of said Court, pursuant to said order, transferred said action to the United States District Court, Southern District of California, Central Division.

V.

That on June 26, 1956, defendant moved said court for an order staying the effect of the court's order dated June 20, 1956, transferring the above-entitled action to the United States District Court for the Southern District of California,

Central Division. That said motion was granted and the Honorable Robert C. Bell entered and filed an order dated June 26, 1956, granting the relief as prayed. That thereafter on July 2, 1956, the defendant moved the United States District Court for the Southern District of California, Central Division, for an order transferring the venue of this action to the United States District Court, District of Minnesota, Third Division, and on July 3, 1956, the court entered and filed its order granting the relief as prayed in the defendant's motion. That thereafter the defendant petitioned the court for a rehearing of the defendant's motion to transfer the venue of this action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, and the said court entered and filed on July 10, 1956, its order granting the defendant's petition for rehearing.

VI.

That thereafter on July 12, 1956, plaintiff moved the said court that in the event that the court determines that the United States District Court, District of Minnesota, Third Division, was not a proper venue for the trial of this action, that the court make its order transferring said action to the United States District Court for the Northern District of California, Southern Division, sitting at San Francisco, California.

VII.

That said petition for rehearing and said alternative motion were duly argued to and heard by said court, the Honorable Robert C. Bell, presiding, on the 31st day of July, 1956. Thereafter, on August 2, 1956, the United States District Court for the District of Minnesota, Third Division, Robert C. Bell, Judge, entered and filed its order denying defendant's motion to transfer the venue of said action to the United States District Court for the Western District of Washington, sitting at Seattle, Washington, and granted plaintiff's motion, in the alternative, to transfer the venue

of said action to the United States District Court for the Northern District of California, Southern Division, sitting at San Francisco, California.

VIII.

That defendant's motion to transfer the venue of said action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, was based upon Section 1404(a) of the United States Judicial Code which provides:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any action to any other district or division where it might have been brought."

IX.

That said motion was based upon affidavits establishing the following facts:

(1) The plaintiff at the time of the accident resided and was employed at Seattle, Washington, which is approximately 1,783 miles from St. Paul, Minnesota, via the Great Northern Railroad, the shortest line of railroad between the two places.

(2) The plaintiff from the date of the accident until January 30, 1956, was hospitalized at Seattle, Washington, and was treated by six medical specialists who reside at Seattle, Washington.

(3) That the plaintiff was transferred to the Veterans' Administration Hospital at Long Beach, California, January 30, 1956, for treatment and rehabilitation and has been and still is a patient at said hospital since said date.

(4) That a total of nineteen persons and six medical specialists who would be necessary and material witnesses at the trial of this case reside in Seattle, Washington.

(5) That the defendant would have to produce said nineteen persons as witnesses at the trial of this case; that said nineteen persons do not include the six medical specialists who attended the plaintiff at Seattle, Washington, who would refuse to leave Seattle, Washington, to testify at the trial of this case if said case were not tried at Seattle, Washington.

(6) That each of said nineteen witnesses would have to spend two and one-half days additional travel time and seven additional days attending the trial of this action if said action were tried at San Francisco, California.

(7) That the additional cost to defendant to try this case at San Francisco, California, rather than at Seattle, Washington, would be Three Thousand Nine Hundred Seventy-four and 79/100 Dollars ($3,974.79).

(8) That San Francisco, California, is approximately 904 miles from Seattle, Washington, via the shortest line of railroad.

(9) That the United States District Court, Western District of Washington, sits at Seattle, Washington, and that the next term of said court will be held commencing November 6, 1956.

(10) That to require said nineteen witnesses to attend the trial of said action at a place other than Seattle, Washington, would seriously inconvenience the railroad in its operations and that depending upon the specific circumstances existing at the time of said trial, it may be impossible because of operating requirements to allow certain of said nineteen witnesses to leave their duties with the defendant and attend the trial of said action if tried other than at Seattle, Washington.

X.

That the plaintiff traveled via railroad from Seattle, Washington, to Long Beach, California, on January 30, 1956, and did not evidence any discomfort or pain as a result of said travel, and that at the present time said plain-

tiff could travel by railroad or air line from Long Beach, California, to Seattle, Washington, accompanied by a nurse, without substantial pain or discomfort and without affecting the physical condition of said plaintiff as a result of said travel.

XI.

That the attending physicians of the plaintiff at the Veterans' Administration Hospital, Long Beach, California, would refuse to appear at San Francisco, California, to testify.

XII.

That the use of depositions to present medical or other testimony is an unsatisfactory means of presenting such evidence to a jury.

XIII.

That plaintiff's opposing affidavits stated that plaintiff would claim a privilege as to the six attending physicians residing at Seattle, Washington, and that the plaintiff is now a resident of the State of California.

XIV.

That this writ of mandamus is made for the reason that no statutory appeal lies from the said order of the United States District Court, District of Minnesota, Third Division, granting plaintiff's alternative motion to transfer the venue of said action to the United States District Court, Northern District of California, Southern Division, sitting at San Francisco, California, under Section 1404(a) of the United States Judicial Code, and denying defendant's motion to transfer the venue of said action to the United States District Court, Western District of Washington, sitting at Seattle, Washington; and that your petitioner has no plain, speedy or adequate remedy in the ordinary course of law since the denial of such an intermediate order is not appealable; that the trial of this case at San Francisco, California, would

impose an unreasonable burden and expense on this defendant and it would be inconvenient to this defendant and to nineteen witnesses and would harass this defendant and would tend to defeat the interests of justice and deprive this defendant of a fair trial; that the administration of orderly justice would not be served upon the trial of this case on the merits at San Francisco, California, and by a reversal of any judgment that might result therefrom on the grounds that the United States District Court, District of Minnesota, Third Division, erred in granting plaintiff's alternative motion and denying this defendant's motion to transfer the venue of this action to the United States District Court, Western District of Washington, sitting at Seattle, Washington.

IT IS ORDERED:

That you, the Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, immediately upon receipt by you of a copy of this writ, shall set aside its order granting plaintiff's alternative motion transferring the venue of this action to the United States District Court, Northern District of California, Southern Division, and shall set aside the order denying defendant's motion to transfer the venue of this action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, and you shall further enter an order granting defendant's motion as prayed, transferring the venue of this action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, or shall show cause by return hereto why you should not perform said acts and duties and why a peremptory writ of mandamus should not issue from this court commanding and requiring performance of said acts and duties. And have you then and there this writ with the return of the court thereon.

YOU ARE FURTHER NOTIFIED that this matter has been set down for oral argument before the United States Court of Appeals on the 7th day of November, 1956, in its

Court Room in the United States Federal Courts Building in St. Louis, Missouri, at the opening of court on said day or as soon thereafter as counsel may be heard.

WITNESS the Honorable John B. Sanborn, Judge of the United States Court of Appeals, and the Seal thereof, this 6th day of August, 1956.

E. E. KOCH
Clerk

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

EDWARD T. HYDE,
Plaintiff-Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant-Relator.

RETURN OF ROBERT C. BELL, UNITED STATES DISTRICT JUDGE, TO ALTERNATIVE WRIT OF MANDAMUS

Robert C. Bell, United States District Judge for the District of Minnesota, for return herein shows cause and certifies:

I.

That defendant's motion under 28 U.S.C.A., Sec. 1404(a) for transfer of the action, wherein Edward T. Hyde is plaintiff and Great Northern Railway Company is defendant, Civil File No. 2850, from the United States District Court for District of Minnesota, Third Division, to the United States

District Court for Western District of Washington, was heard and determined by your respondent as Judge of the United States District Court for the District of Minnesota.

II.

That the said District Court at all times referred to herein had jurisdiction of said action and the said motion to transfer the same as aforesaid; that said motion was heard for the first time on May 28, 1956, at which time plaintiff opposed said motion and duly moved the court orally in alternative that, if the court should determine that the case should be transferred to another district for trial, the case should be transferred to the United States District Court for the Southern District of California, Central Division, which said motion of plaintiff was opposed by defendant.

III.

That at the hearing on May 28, 1956, the parties filed affidavits, and presented both written and oral arguments in support of their contentions; that the court duly considered all the facts presented by the affidavits used on the hearing and the briefs and arguments of counsel and especially the provisions of 28 U.S.C.A., Sec. 1404(a) and the decisions of the Supreme Court of the United States and other federal courts construing that section; that, after such consideration of the questions raised by said motions, the court in the exercise of the judicial discretion and power vested in it by said section 1404(a) by order of June 20, 1956, duly made and filed, denied defendant's motion and granted plaintiff's motion to transfer the case to United States District Court for the Southern District of California, Central Division; that said order for the transfer of said case was in accordance with 28 U.S.C.A., Sec. 1404(a) in that it was for the convenience of the parties and witnesses, in the interest of justice; and that on June 26, 1956, by order duly made and filed, the court stayed the effect of said order of June 20, 1956, for a period of fourteen days from June 26, 1956.

IV.

That, the case having been re-transferred without prejudice to the United States District Court for Minnesota, Third Division, by the United States District Court for the District of Southern California, Central Division, defendant was granted, by order made and filed on July 10, 1956, a re-hearing of the motion to transfer.

V.

That on July 12, 1956, plaintiff filed written objections to the defendant's said motion to transfer and also a written motion in the alternative to the effect that, if the court should hold that the case should be transferred to another district from the one in which it was then pending, the court should transfer the case to the United States District Court for the Northern District of California, Southern Division, sitting at San Francisco (Exhibit O, attached to petition).

VI.

The said motions of plaintiff and defendant referred to in the paragraphs IV and V hereof came duly on for hearing on July 31, 1956; the parties filed affidavits, and presented both written and oral arguments in support of their contentions; that the court duly considered all the facts presented by the affidavits used on the hearing and the briefs and arguments of counsel and especially the provisions of 28 U.S.C.A., Sec. 1404(a) and the decisions of the Supreme Court of the United States and other federal courts construing that section; that, after such consideration of the questions raised by said motions, the court in the exercise of the judicial discretion and power vested in it by said section 1404(a) by order of August 2, 1956, duly made and filed, denied defendant's motion and granted plaintiff's alternative motion to transfer said case from the United States District Court for Minnesota, Third Division, to the United States District Court for the Northern District of California, Southern Division; and that said order for the transfer of said case as aforesaid was in accordance with 28 U.S.C.A., Sec. 1404(a)

in that it was for the convenience of the parties and witnesses, in the interest of justice.

VII.

That, four days after the order for such transfer had been so duly made and entered as set forth in the preceding paragraph, defendant on August 6, 1956, filed its petition in this court, the United States Court of Appeals for the Eighth Circuit, for a writ of mandamus herein and that on August 6, 1956, four days after such order for the transfer of the case had been so duly made and filed, pursuant to such petition of defendant this court issued its alternative writ of mandamus to which this return is made.

VIII.

That, the documents on file in the district court are correctly enumerated in paragraph XIV of the petition.

WHEREFORE, your respondent prays that judgment be entered in all things quashing the alternative writ herein and that the proceedings herein be in all things dismissed.

Dated September . . ., 1956.

ROBERT C. BELL
Judge of the United States District Court
for the District of Minnesota, Respondent

EUGENE A. RERAT
610 Baker Building
Minneapolis 2, Minnesota
and
HARRY H. PETERSON
505 Minnesota Federal Building
Minneapolis 2, Minnesota

Attorneys for Robert C. Bell,
Judge of the United States District
Court for the District of Minnesota,
Respondent

By Harry H. Peterson

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

EDWARD T. HYDE,
Plaintiff-Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant-Relator.

RETURN OF ROBERT C. BELL, UNITED STATES DISTRICT JUDGE, TO ALTERNATIVE WRIT OF PROHIBITION

Robert C. Bell, United States District Judge for the District of Minnesota, for return herein shows cause and certifies:

I.

That defendant's motion under 28 U.S.C.A., Sec. 1404(a) for transfer of the action, wherein Edward T. Hyde is plaintiff and Great Northern Railway Company is defendant, Civil File No. 2850, from the United States District Court for District of Minnesota, Third Division, to the United States District Court for Western District of Washington, was heard and determined by your respondent as Judge of the United States District Court for the District of Minnesota.

II.

That the said District Court at all times referred to herein had jurisdiction of said action and the said motion to transfer the same as aforesaid; that said motion was heard for the first time on May 28, 1956, at which time plaintiff opposed said motion and duly moved the court orally in alternative that, if the court should determine that the case should be transferred to the United States District Court for the

Southern District of California, Central Division, which said motion of plaintiff was opposed by defendant.

III.

That at the hearing on May 28, 1956, the parties filed affidavits, and presented both written and oral arguments in support of their contentions; that the court duly considered all the facts presented by the affidavits used on the hearing and the briefs and arguments of counsel and especially the provisions of 28 U.S.C.A., Sec. 1404(a) and the decisions of the Supreme Court of the United States and other federal courts construing that section; that, after such consideration of the questions raised by said motions, the court in the exercise of the judicial discretion and power vested in it by said section 1404(a) by order of June 20, 1956, duly made and filed, denied defendant's motion and granted plaintiff's motion to transfer the case to United States District Court for the Southern District of California, Central Division; that said order for the transfer of said case was in accordance with 28 U.S.C.A., Sec. 1404(a) in that it was for the convenience of the parties and witnesses, in the interest of justice; and that on June 26, 1956, by order duly made and filed, the court stayed the effect of said order of June 20, 1956, for a period of fourteen days from June 26, 1956.

IV.

That, the case having been re-transferred without prejudice to the United States District Court for Minnesota, Third Division, by the United States District Court for the District of Southern California, Central Division, defendant was granted, by order made and filed on July 10, 1956, a re-hearing of the motion to transfer.

V.

That on July 12, 1956, plaintiff filed written objections to the defendant's said motion to transfer and also a written motion in the alternative to the effect that, if the court should

hold that the case should be transferred to another district from the one in which it was then pending, the court should transfer the case to the United States District Court for the Northern District of California, Southern Division, sitting at San Francisco (Exhibit O, attached to petition).

VI.

The said motions of plaintiff and defendant referred to in the paragraphs IV and V hereof came duly on for hearing on July 31, 1956; the parties filed affidavits, and presented both written and oral arguments in support of their contentions; that the court duly considered all the facts presented by the affidavits used on the hearing and the briefs and arguments of counsel and especially the provisions of 28 U.S.C.A., Sec. 1404(a) and the decisions of the Supreme Court of the United States and other federal courts construing that section; that, after such consideration of the questions raised by said motions, the court in the exercise of the judicial discretion and power vested in it by said section 1404(a) by order of August 2, 1956, duly made and filed, denied defendant's motion and granted plaintiff's alternative motion to transfer said case from the United States District Court for Minnesota, Third Division, to the United States District Court for the Northern District of California, Southern Division; and that said order for the transfer of said case as aforesaid was in accordance with 28 U.S.C.A., Sec. 1404(a) in that it was for the convenience of the parties and witnesses, in the interest of justice.

VII.

That, four days after the order for such transfer had been so duly made and entered as set forth in the preceding paragraph, defendant on August 6, 1956, filed its petition in this court, the United States Court of Appeals for the Eighth Circuit, for a writ of prohibition herein and that on August 6, 1956, four days after such order for the transfer of the case had been so duly made and filed, pursuant to such

petition of defendant this court issued its alternative writ of prohibition to which this return is made.

VIII.

That, the documents on file in the district court are correctly enumerated in paragraph XIV of the petition.

WHEREFORE, your respondent prays that judgment be entered in all things quashing the alternative writ herein and that the proceedings herein be in all things dismissed.

Dated September ...., 1956.

ROBERT C. BELL
Judge of the United States District Court
for the District of Minnesota, Respondent

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and
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Minneapolis 2, Minnesota

Attorneys for Robert C. Bell,
Judge of the United States District
Court for the District of Minnesota,
Respondent

By Harry H. Peterson

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

EDWARD T. HYDE,
Plaintiff-Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant-Relator.

RETURN OF PLAINTIFF-RESPONDENT, EDWARD T. HYDE, TO ALTERNATIVE WRIT OF MANDAMUS

Now comes Edward T. Hyde, above named plaintiff-respondent, and for his return herein:

I.

In all things adopts the return of the Honorable Robert C. Bell, United States District Judge, to the alternative writ of mandamus made and filed herein and makes it a part hereof as follows as though the same had been pleaded and set forth herein at length.

II.

That by reason of the premises aforesaid the alternative writ issued herein should be quashed and the proceedings herein dismissed.

WHEREFORE, plaintiff-respondent prays that judgment be entered in all things quashing the alternative writ herein and that the proceedings herein be in all things dismissed.

Dated September ...., 1956.

EUGENE A. RERAT
610 Baker Building
Minneapolis 2, Minnesota
and
HARRY H. PETERSON
505 Minnesota Federal Building
Minneapolis 2, Minnesota
Attorneys for Edward T. Hyde,
Plaintiff-Respondent
By Harry H. Peterson

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

EDWARD T. HYDE,
Plaintiff-Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant-Relator.

RETURN OF PLAINTIFF-RESPONDENT, EDWARD T. HYDE, TO ALTERNATIVE WRIT OF PROHIBITION

Now comes Edward T. Hyde, above named plaintiff-respondent, and for his return herein:

I.

In all things adopts the return of the Honorable Robert C. Bell, United States District Judge, to the alternative writ of prohibition made and filed herein and makes it a part hereof as follows as though the same had been pleaded and set forth herein at length.

II.

That by reason of the premises aforesaid the alternative writ issued herein should be quashed and the proceedings herein dismissed.

WHEREFORE, plaintiff-respondent prays that judgment be entered in all things quashing the alternative writ herein and that the proceedings herein be in all things dismissed.

Dated September ...., 1956.

EUGENE A. RERAT
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Minneapolis 2, Minnesota
and
HARRY H. PETERSON
505 Minnesota Federal Building
Minneapolis 2, Minnesota

Attorneys for Edward T. Hyde,
Plaintiff-Respondent

By Harry H. Peterson

(Opinion Filed December 18, 1956.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,630

Great Northern Railway Company, a corporation,
Relator-Petitioner,

vs.

Edward T. Hyde,
Plaintiff-Respondent,

Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Application for Writ of Prohibition and Mandamus.

(December 18, 1956)

Don E. Engle (Edwin C. Matthias and Anthony Kane were with him on the brief), for Relator-Petitioner.

Harry H. Peterson (Eugene A. Rerat was with him on the brief), for Plaintiff-Respondent and Respondents.

Before Sanborn, Woodrough and Whittaker, Circuit Judges.

Sanborn, Circuit Judge.

The vital question for decision in this case is whether Sec. 1651(a) of 28 U.S.C.[1] furnishes a means for reviewing on order of the District Court, not otherwise reviewable, transferring, under Sec. 1404(a) of 28 U.S.C.,[2] from the District of Minnesota to the Northern District of California a personal injury case arising out of an accident which occurred in the city of Seattle, Washington. We are asked to prohibit Judge Bell, acting for the United States District Court for the District of Minnesota, from effectuating his order transferring the case to the Northern District of California, and to command him to transfer it to the Western District of Washington for trial at Seattle.

The following are the facts upon which the application of the Great Northern Railway Company for a writ of prohibition and mandamus are based:

Edward T. Hyde, while working as a switch foreman for the Great Northern Railway Company in its yard at Seattle, on November 5, 1955, was seriously injured. He employed a Minneapolis attorney and brought an action on February 23, 1956, against the Railway Company, under the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 et seq., in the United States District Court for the District of Minnesota, Third Division, to recover damages for his injuries. His claim was that the accident resulted from the negligence

[1] "Sec. 1651 Writs.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[2] "Sec. 1404. Change of venue.

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

of the defendant and a violation by it of the Federal Safety Appliance Act.

The defendant on March 16, 1956, filed its answer denying liability, and gave notice of a motion to transfer the case, under Sec. 1404(a), to the Western District of Washington, for trial at Seattle. The motion was based upon affidavits showing that, for the convenience of material witnesses and the saving of unnecessary expense to the defendant; Seattle, where the accident occurred, where the plaintiff resided at the time of the accident, and where he received medical and hospital care and treatment from the time of his injury to January 30, 1956, was the most convenient and appropriate place for the trial of the case.

In opposition to the defendant's motion, counsel for the plaintiff lodged with the court an affidavit stating that the defendant had its home office in Minnesota, where it was incorporated; that the burden of producing medical evidence was on the plaintiff; and that such evidence was as readily available in Minnesota as elsewhere. An affidavit of the plaintiff's wife, also lodged with the court, stated that from November 6, 1955, to January 30, 1956, the plaintiff was in a hospital at Seattle under the care of a Great Northern Railway Company physician; that, upon the physician's recommendation, the plaintiff was transferred to the Veteran's Hospital at Long Beach, California, for treatment, and has been there since February 1, 1956; that she and the plaintiff had decided to make California their home; that, because of his injuries, it is very difficult for the plaintiff to travel; that it would be better if the trial of this case could be had in the city of Los Angeles, California; that she and the plaintiff "would prefer that the case be tried in St. Paul, Minnesota, for the reason that when her said husband is discharged from

the Veterans' Hospital in Long Beach, it is her intention to bring him to the State of Minnesota for medical examinations and further treatment, and" she "feels that if the case cannot be tried in the City of St. Paul, State of Minnesota, that it would be more convenient for her said husband if the case could be transferred to the State of California," for trial at Los Angeles.

On May 28, 1956, a hearing was had before Judge Bell on the motion of the defendant for a transfer of the case to the Western District of Washington and the opposition of the plaintiff and his request or suggestion that if the court determined that the case should not be tried in the District of Minnesota, the transfer be to the Southern District of California, Central Division.

Judge Bell on June 20, 1956, denied the motion of the defendant to transfer the case to the Western District of Washington, and, instead, transferred it to the Southern District of California, for trial at Los Angeles.

The defendant on June 26, 1956, moved Judge Bell for an order staying the effect of his transfer order of June 20, 1956, upon the ground, among others, that there had been no showing that the action could have been brought in the Southern District of California. The motion for a stay was granted. On July 3, 1956, the United States District Court for the Southern District of California, on motion of the defendant, returned the case to the District of Minnesota.

On July 17, 1956, Judge Bell granted a motion of the defendant for a rehearing of its motion for a transfer of the case to the Western District of Washington. Thereafter on July 28, 1956, the plaintiff filed a motion opposing the transfer, but asking the court to transfer the case to the Northern District of California, for trial at San Francisco, if the court

should decide that the District of Minnesota was not the proper venue.

The rehearing of the defendant's motion to transfer the case to the Western District of Washington, for trial at Seattle, and the hearing of the motion of the plaintiff that, if transferred at all, the case be transferred to the Northern District of California, for trial at San Francisco, came on before Judge Bell on July 31, 1956. On August 2, 1956, he filed an order denying the defendant's motion and transferring the case to the Northern District of California.

The General Offices of the defendant are in St. Paul, Minnesota, where the case would have been for trial had it not been transferred. St. Paul adjoins Minneapolis, where the attorney for the plaintiff resides and has his office, but is otherwise unrelated in any way to the plaintiff's action or the claim upon which it is based.

The city of San Francisco, where it is conceded the plaintiff's action could have been brought, is nearer the Veterans' Hospital at Long Beach than is Seattle or St. Paul. St. Paul, however, is farther from Long Beach than is Seattle. Aside from the proximity of San Francisco to Long Beach, where the plaintiff and his wife have resided since he entered the Veterans' Hospital, San Francisco has no connection with his action.

Judge Bell, in his return to the defendant's application for a writ of prohibition and mandamus, states that, in transferring the case to the Northern District of California, the court properly exercised the judicial power and discretion vested in it by Sec. 1404(a), and that the order of transfer was in accordance with that section "in that it was for the convenience of the parties and witnesses, in the interest of justice."

While we do not question the sincerity of the belief of Judge Bell that the transfer of the plaintiff's case for trial at San Francisco was made in the exercise of a sound judicial discretion and in conformity with the letter and spirit of Sec. 1404(a), we believe that there was no adequate factual or legal basis for the transfer. If the order transferring the case were subject to review for an erroneous exercise of a sound discretion, we would not hesitate to reverse the order and direct the District Court to transfer the case to Seattle, where the plaintiff's claim arose and where most of the persons reside who will be called to give evidence at the trial. We are of the opinion, however, that the transfer order is not subject to review by prohibition or mandamus, despite the fact that it is not an appealable order and that an appeal from a final judgment in the case will be an inadequate remedy for the erroneous transfer.

This Court held in *Carr v. Donohoe*, 201 F. 2d 426, that Sec. 1651(a) of 28 U.S.C. did not furnish a means for reviewing an order transferring an action from one District to another District within this Circuit. We think there is no controlling distinction between the *Carr* case and the instant case so far as the question of reviewability, under Sec. 1651(a), of transfer orders is concerned. In the *Carr* case we pointed to the intracircuit transfer merely to show that there was no possibility of the appellate jurisdiction of this Court being affected in any way by such a transfer.

In the case of *In re Josephson*, 1 Cir. 218 F. 2d 174, the United States Court of Appeals for the First Circuit, in dealing with the question of reviewability of a transfer order, said in an opinion by Chief Judge Magruder (page 181 of 218 F. 2d):

"• • • But assuming that if the transfer order is ever to be reviewed it must be now, we do not forget that appellate review is not of the essence of due process. See *McKane v. Durston*, 1894, 153 U.S. 684, 687, 14 S. Ct. 913, 38 L. Ed. 867. Particularly, there may be strong reasons of policy why litigation should not be delayed by appellate review of an administrative order of the sort here involved. It is not unlike an order by a federal district court remanding a case to the state court from which it had been removed. Here Congress has specifically provided that such an order 'is not reviewable on appeal or otherwise.' 28 U.S.C. Sec. 1447(d), as amended. In certain situations, the fact that a prejudicial order unless presently reviewable can never be corrected on appeal may be a consideration bearing on whether the order is to be deemed a 'final decision' from which an appeal may be taken under 28 U.S.C. Sec. 1291. See *Cobbledick v. United States*, 1940, 309 U. S. 323, 328-330, 60 S. Ct. 540, 84 L. Ed. 783. But we do not have such a situation here, since it is conceded that the transfer order now in question is an unappealable interlocutory order."

The position taken by the First Circuit in that case is stated on page 183 of 218 F. 2d, as follows:

"Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus."

Substantially the same position had been taken by the Third Circuit in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010. Judge Goodrich, who wrote the opinion in that case, after stating the truism that "Every litigant against

whom the transfer issue is decided naturally thinks the judge was wrong," said:

> "We do not propose to grant such review where the judge in the district court has considered the interests stipulated in the statute and decided thereon. * * *"

He concluded the opinion as follows:

> "We realize that the view we express is not the one which some of our judicial brethren are following with regard to this statute. But we cannot escape the conclusion that it will be highly unfortunate if the result of an attempted procedural improvement is to subject parties to two lawsuits: first, prolonged litigation to determine the place where a case is to be tried; and, second, the merits of the alleged cause of action itself."

The Fourth Circuit, in a recent opinion by Chief Judge Parker in the case of *Clayton v. Warlick*, 232 F. 2d 699, has held that, while mandamus or prohibition will lie to compel a District Judge to exercise the discretion conferred upon him by Sec. 1404(a) or to prevent him from transferring a case to a District to which, as a matter of law, it is not transferable, Sec. 1651(a) does not afford a means for the review of an order such as that here involved. The court said (page 706 of 232 F. 2d):

> "The correct rule to be applied, we think, is the same as that applied in the case of other interlocutory orders, i.e., where the judge has exercised a power, conferred upon him by law, mandamus may not be availed of to review the exercise of the power in the face of the restriction placed by Congress on the review of interlocutory orders. The distinction which we think applicable was that drawn by the Supreme Court in *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217, 65 S. Ct. 1130, 1133, 89 L. Ed. 1566, where the court said:

"'When Congress withholds interlocutory reviews, Sec. 262 [now 28 U.S.C. Sec. 1651] can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of Sec. 262.'

"See also the concurring opinion of Judge Swan in *Ford Motor Co. v. Ryan*, 2 Cir., 182 F. 2d 329, 332, and the decision of the Court of Appeals of the Second Circuit in *Ward Baking Co. v. Holtzoff*, 2 Cir., 164 F. 2d 34, 36 where the court said:

"'Section 262 of the Judicial Code, 28 U.S.C.A. Sec. 377 [now 28 U.S.C. Sec. 1651] cannot be availed of to correct a mere error in the exercise of conceded judicial power, but may be used to prevent usurpation of power, if "the lower court is clearly without jurisdiction."'".

We find ourselves in complete accord with the opinion in *Clayton v. Warlick*, supra. As Chief Judge Parker says in that opinion, the expressions of the various circuits with respect to the reviewability of orders of transfer under Sec. 1404(a), through the use of Sec. 1651(a), are in hopeless conflict.

This Court has, perhaps, been more conservative than other courts of appeals in resisting the use of Sec. 1651(a) as a device for reviewing nonappealable interlocutory orders. In an opinion written for this Court by Judge Walter H. Sanborn in 1927, in *Hosey v. Kennamer*, 8 Cir., 21 F. 2d 64, 65, he said:

"* * * When a question has been decided by the officer or person to whose judgment or discretion the law has intrusted its determination, the writ of mandamus may

not issue to review or reverse that decision or to compel another. It may issue to command judicial officers to hear and to decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment, because such action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officer or officers to whose judgment and discretion the law intrusted the decision of the issue. For the same reason it cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision. *Kimberlin v. Commission to Five Civilized Tribes* (C.C.A.) 104 F. 653, 655; *Henderson Tire & Rubber Co. v. Reeves & Otis, Judges* (C.C.A. 14 F. (2d) 903, 906; *Minnesota Moline Plow Co. v. Dowagiac Mfg. Co.* (C.C.A.) 126 F. 746, 748; *Brictson Mfg. Co. v. Munger, Judge* (C.C.A. 20 F. (2d) 793."

See, also: *Sound Investment & Realty Co. v. Harper*, 8 Cir., 178 F. 2d 274; *Larsen v. Nordbye*, 8 Cir., 181 F. 2d 765; *Larsen v. Switzer*, 8 Cir., 183 F. 2d 850; *Leimer v. Reeves*, 8 Cir., 184 F. 2d 441; *Hydraulic Press Mfg. Co. v. Moore*, 8 Cir., 185 F. 2d 800, 802-803; *Petsel v. Riley*, 8 Cir., 192 F. 2d 954.

This Court has used its power to issue writs of mandamus or prohibition to compel a District Judge to exercise a jurisdiction which the law has made it his duty to exercise (*Barber Asphalt Paving Co. v. Morris*, 8 Cir., 132 F. 945, 956) or to prevent a judge from exercising a power that he clearly does not have. We have studiously refrained from using mandamus to tell a judge what decision he must make in the exercise of a jurisdiction and discretion intrusted to him by law.

The Supreme Court has said:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. * * * As extraordinary remedies, they are reserved for really extraordinary cases."

Ex Parte Fahey, 332 U.S. 258, 259-260; *Ex Parte Collett*, 337 U.S. 55, 72. We do not regard controversies between litigants, and between their counsel, as to where a case can most conveniently, fairly, efficiently and economically be tried as "really extraordinary."

It is unfortunate that the question of the reviewability of a transfer order under Sec. 1651(a) has not as yet been put at rest. The Supreme Court, in *Norwood v. Kirkpatrick*, 349 U.S. 29, 33, found it unnecessary to determine whether mandamus or prohibition was a proper remedy to test the validity of a transfer order. The instant case squarely presents that question and it would seem to be an appropriate case in which to apply for certiorari.

So far as this Court is concerned, we shall hereafter grant leave to apply for mandamus or prohibition to review transfer orders if and when an Act of Congress or a decision of the Supreme Court requires us to do so. We think that, in the interest of an expeditious, efficient and orderly administration of justice, controversies about venue should be finally settled and determined at the District Court level.

The application of the defendant for a writ prohibiting the transfer of the plaintiff's case to the Northern District of California and directing its transfer to the Western District of Washington, is denied upon the sole ground that the transfer order complained of by the defendant is not reviewable here by prohibition, mandamus or otherwise.

Application denied.

VACATED

(JUDGMENT)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15630—September Term, 1956.
Tuesday, December 18, 1956.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Relator-Petitioner,

vs.

EDWARD T. HYDE,
Plaintiff-Respondent,

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Application for Writ of Prohibition and Mandamus.

This cause came on to be heard on the Application of Relator-Petitioner, Great Northern Railway Company, for a Writ of Prohibition and Mandamus, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Application of the Defendant, Great Northern Railway Company, a Corporation, in the United States District Court for the District of Minnesota, for a Writ prohibiting the transfer of the Plaintiff's (Edward T. Hyde) case to the Northern District of California and directing its transfer to the Western District of Washington, be and is by this Court hereby denied upon the sole ground that the transfer order complained of by the Defendant is not reviewable in this Court by prohibition, mandamus, or otherwise.

And it is further Ordered and Adjudged by this Court that the Alternative Writ of Prohibition and the Alternative Writ of Mandamus heretofore issued by this Court in this matter be, and they are each hereby, discharged and dismissed.

December 18, 1956.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 15630

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Relator-Petitioner,

vs.

EDWARD T. HYDE,
Plaintiff-Respondent,

vs.

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and the Other Judges and Officers of the United States District Court, District of Minnesota;
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Edwin C. Matthias, Anthony Kane and Don E. Engle, counsel for and on behalf of the Great Northern Railway Company, a corporation, relator-petitioner in the above-entitled action, respectfully move the court for leave to file a petition for rehearing of the above-entitled case. Said motion is based upon the affidavit of D. E. Engle attached hereto and made a part hereof.

EDWIN C. MATTHIAS
ANTHONY KANE
D. E. ENGLE
By D. E. ENGLE
Attorneys for Relator-Petitioner
175 East Fourth Street
St. Paul 1, Minnesota

DATED: February 6th, 1957.

(Title of Cause)

AFFIDAVIT OF D. E. ENGLE

STATE OF MINNESOTA }
COUNTY OF RAMSEY } ss

D. E. ENGLE, being first duly sworn, deposes and says that he is one of the attorneys of record for the Great Northern Railway Company, a corporation, relator-petitioner in the above-entitled action.

Affiant further states that on January 14, 1957, the United States Supreme Court rendered its decision in the case entitled *LaBuy v. Howes Leather Company*, —— U. S. ——, 77 Supreme Court Reporter 309, and that said case in the opinion of your affiant determines the issues raised by the application for the writ of prohibition and the writ of mandamus by the Great Northern Railway Company, a corporation, in the above-entitled action.

Affiant further states that the United States Court of Appeals for the Eight Circuit rendered its opinion on December 18, 1956, determining the issues raised on the application for the writ of prohibition and the writ of mandamus filed by the Great Northern Railway Company, a corporation, in the above-entitled action, and that said court, pursuant to said opinion, entered its judgment pursuant to said opinion on December 18, 1956; that said opinion and said judgment were rendered and filed without benefit of the United States Supreme Court's decision decided January 14, 1957, in the case entitled *LaBuy v. Howes Leather Company, supra*.

Affiant further states that this affidavit is made in support of Great Northern Railway Company's motion for leave to

file a petition for rehearing in the above-entitled action in the United States Court of Appeals for the Eighth Circuit.

D. E. ENGLE

(SEAL):

Suscribed and sworn to before me this 6th day of February, 1957.

LENORE F. GADOW

Notary Public, Ramsey County, Minn.

My Commission Expires June 22, 1963.

(Endorsed: Filed in U. S. Court of Appeals, Feb. 6, 1957.)

(Title of Cause)

ORDER

Upon motion of Edwin C. Matthias, Anthony Kane and D. E. Engle, counsel for and on behalf of the Great Northern Railway Company, a corporation, relator-petitioner,

IT IS ORDERED that said motion for leave to file a petition for rehearing of the above-entitled case in the United States Court of Appeals is hereby granted.

IT IS FURTHER ORDERED that said petition for rehearing shall be filed in the office of the Clerk of the Court of the United States Court of Appeals on or before the 18th day of February, 1957.

IT IS FURTHER ORDERED that if a petition for rehearing is filed in this case by the Great Northern Railway Company, a corporation, relator-petitioner, within the time as herein specified, all proceedings in the above-entitled matter are hereby stayed until final disposition of said petition for rehearing by the United States Court of Appeals for the Eighth Circuit.

DATED this 8th day of February, 1957.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 15,630

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Relator-Petitioner,

vs.

EDWARD T. HYDE,
Plaintiff-Respondent,

vs.

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and the Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

RELATOR-PETITIONER'S PETITION FOR REHEARING

The Great Northern Railway Company, Relator-Petitioner, respectfully petitions this Honorable Court for a rehearing on the application for the Writ of Prohibition and Writ of Mandamus in the above-entitled cause, and presents this, its petition for a rehearing, and in support thereof represents to the Court as follows:

I.

That this Court by its opinion dated December 18, 1956, denied the application of the relator-petitioner for a writ of prohibition and mandamus upon the sole ground that the transfer order complained of by the relator-petitioner was

not reviewable by prohibition or mandamus under 28 U.S.C. 1651(a). That subsequently on January 14, 1957, the United States Supreme Court filed its opinion in *LaBuy v. Howes Leather Company*, 352 U.S. ——, 77 S. Ct. 309, a copy of which is hereto appended, and unequivocally construed 28 U.S.C. 1651(a) as granting to Courts of Appeals the power to review interlocutory orders by prohibition and mandamus, necessarily including this transfer order under Sec. 1404(a).

II.

That this Court stated in its opinion, "It is unfortunate that the question of the reviewability of a transfer order under Sec. 1651(a) has not as yet been put at rest. * * * The instant case * * * would seem to be an appropriate case in which to apply for certiorari."

III.

That consistent with this Court's opinion the relator-petitioner obtained an order staying the effect of the Judgment entered December 18, 1956, until March 18, 1957, for the purpose of filing a petition for a writ of certiorari in the United States Supreme Court; on February 7, 1957, this Court granted leave to file this petition for rehearing in view of the United States Supreme Court's recent decision.

IV.

That *LaBuy v. Howes Leather Company, supra*, is determinative of the issues which would be raised by a petition for a writ of certiorari in the United States Supreme Court

in this action, and in view of this fact it is unlikely the United States Supreme Court would again grant certiorari to review the same issues resolved in its recent decision.

V.

That this Court further stated in its opinion "* * * we believe that there was no adequate factual or legal basis for the transfer [to the Northern District of California]. If the order transferring the case were subject to review for an erroneous exercise of a sound discretion, we would not hesitate to reverse the order and direct the District Court to transfer the case to Seattle, * * *."

For the reasons stated above, petitioner requests that a rehearing be granted and that on such rehearing the judgment of this Court be reversed and the petition for a writ of prohibition be granted ordering respondent to vacate and set aside the order transferring the action to the Northern District of California and that a writ of mandamus be granted directing respondent to enter an order transferring the action to the United States District Court for the Western District of Washington.

Respectfully submitted,

EDWIN C. MATTHIAS
ANTHONY KANE
D. E. ENGLE
Attorneys for Relator-Petitioner
Great Northern Railway Company
175 East Fourth Street
St. Paul 1, Minnesota

CERTIFICATE OF COUNSEL

State of Minnesota
County of Ramsey—ss.

D. E. ENGLE, being first duly sworn, on oath, certifies and says:

That he is one of the attorneys for the relator-petitioner in this cause; that he makes this certificate in compliance with Rule 15(a) of this Court; that in his judgment the within and foregoing petition for rehearing is filed in complete good faith and is believed by said counsel to be meritorious.

D. E. ENGLE

Subscribed and sworn to before me
this 13 day of February, 1957.
Lenore F. Cadow

.....

Lenore F. Cadow
Notary Public, Ramsey County, Minn.
My Commission Expires June 22, 1963.
(Notarial Seal)

APPENDIX

HONORABLE WALTER J. LA BUY, Petitioner,

v.

HOWES LEATHER COMPANY, INC., AND MONTGOMERY WARD & CO., INC.

No. 27.

Argued Oct. 17 and 18, 1956.

Decided Jan. 14, 1957.

Proceedings on petitions for writs of mandamus to compel a United States District Judge to vacate orders referring antitrust cases for trial before a master. The United States Court of Appeals for the Seventh Circuit, 226 F. 2d 703, entered judgment issuing writs, and certiorari was granted. The Supreme Court, Mr. Justice Clark, held that where district judge who was informed as to nature of antitrust cases, the parties and pleadings, who had heard arguments on motions to dismiss, to compel testimony on depositions and for summary judgment, referred, over objections of all parties, actions to master on general issue before either existence of alleged conspiracies or questions of liability had been determined, and he included issues of damages and propriety of injunctions in references, Court of Appeals was justified in finding orders of reference were in abuse of judge's power under rule relating to references and in issuing writs of mandamus to vacate such orders.

Affirmed.

Mr. Justice Brennan, Mr. Justice Frankfurter, Mr. Justice Burton and Mr. Justice Harlan dissented.

1. COURTS 383(1)

Because of the importance in administration of Federal Rules of Civil Procedure of the question of the power of Courts of Appeals to issue writs of mandamus to compel a district judge to vacate orders referring antitrust cases for trial before a master and because of uncertainty on question among Courts of Appeals, the Supreme Court granted certiorari to review cases wherein Court of Appeals had compelled by mandamus a district judge to vacate such reference orders. Fed. Rules Civ. Proc. rule 53(b), 28 U.S.C.A.; 28 U.S.C.A. § 1651(a).

2. COURTS 404

The 1948 recodification of the All Writs Act did not affect power of the Courts of Appeals to issue writs of mandamus in aid of jurisdiction. 28 U.S.C.A. § 1651(a).

3. COURTS 404

In view of fact that Court of Appeals could at some stage of antitrust proceedings entertain appeal therein, it had power, in proper circumstances, to issue writs of mandamus to compel district judge to vacate interlocutory orders referring such cases to master for trial. Fed. Rules Civ. Proc. rule 53(b), 28 U.S.C.A.; 28 U.S.C.A. § 1651(a).

4. FEDERAL CIVIL PROCEDURE 1877
MANDAMUS 53

Where district judge who was informed as to nature of antitrust cases, the parties and pleadings, who had heard arguments on motions to dismiss, to compel testimony on depositions and for summary judgment, referred, over objections of all parties, actions to master on general issue before either existence of alleged conspiracies or questions of im-

bility had been determined, and he included issues of damages and propriety of injunctions in references, Court of Appeals was justified in finding orders of reference were in abuse of judge's power under rules relating to references and in issuing writs of mandamus to vacate such orders. Fed. Rules Civ. Proc. rule 53(b), 28 U.S.C.A.; 28 U.S.C.A. § 1651(a).

5. FEDERAL CIVIL PROCEDURE 1872

The use of masters is to aid the judge in performance of specific judicial duties as they may arise in case and not to displace the court. Fed. Rules Civ. Proc. rule 53(b), 28 U.S.C.A.

6. MANDAMUS 32

Where subject concerns enforcement of rules which by law it is duty of Supreme Court to formulate and put in force, mandamus should issue to prevent such action thereunder as is so palpably improper as to place it beyond the scope of the rule invoked. Fed. Rules Civ. Proc. rule 53(b), 28 U.S.C.A.; 28 U.S.C.A. § 1651(a).

7. MANDAMUS 24

Mandamus to a district judge should be resorted to only in extreme cases, since it places judges in anomalous position of being litigants without counsel other than uncompensated volunteers. 28 U.S.C.A. § 1651(a).

8. FEDERAL CIVIL PROCEDURE 1875

Under rule providing that in actions tried without a jury, save in matters of account, a reference shall be made only upon showing of some exceptional conditions, litigants are entitled to trial by court, in every suit, save where such

exceptional conditions are shown. Fed. Rules Civ. Proc. rule 53(b), 28 U.S.C.A.

9. FEDERAL CIVIL PROCEDURE 1877

For purposes of rule providing that in actions tried without jury, save in matters of account, reference shall be had only upon showing of exceptional condition, that calendar was congested, that antitrust cases referred were of unusual complexity both as to issues of fact and law and that great length of time would be required for trials did not constitute "exceptional conditions" justifying reference of such cases on the general issue. Fed. Rules Civ. Proc. rule 53(b), 28 U.S.C.A.

See publication Words and Phrases, for other judicial constructions and definitions of "Exceptional Condition."

10. FEDERAL CIVIL PROCEDURE 1878

Issues of detailed accounting in antitrust cases might properly be referred to master after court had determined overall liability of defendants, if circumstances indicated that use of court's time would not be warranted in receiving proof and making tabulation. Fed. Rules Civ. Proc. rule 53(b), 28 U.S.C.A.

Mr. James A. Sprowl, Chicago, Ill., for petitioner.

Mr. Jack I. Levy, Chicago, Ill., for respondents.

Mr. Justice CLARK delivered the opinion of the Court.

[1] These two consolidated cases present a question of the power of the Courts of Appeals to issue writs of mandamus to compel a District Judge to vacate his orders entered under Rule 53(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., referring antitrust cases for trial before a

master. The petitioner, a United States District Judge sitting in the Northern District of Illinois, contends that the Courts of Appeals have no such power and even if they did that these cases were not appropriate ones for its exercise. The Court of Appeals for the Seventh Circuit has decided unanimously that it has such power and, by a divided court, that the circumstances surrounding the references by the petitioner required it to issue the mandamus about which he complains. 226 F. 2d 703. The importance of the question in the administration of the Federal Rules of Civil Procedure, together with the uncertainty existing on the issue among the Courts of Appeals led to our grant of a writ of certiorari. 350 U. S. 964, 76 S. Ct. 439. We conclude that the Court of Appeals properly issued the writs of mandamus.

History of the Litigation.—These petitions for mandamus, filed in the Court of Appeals, arose from two antitrust actions instituted in the District Court in 1950.[1] Rohlfing[2] involves 87 plaintiffs, all operators of retail independent shoe repair shops. The claim of these plaintiffs against the six named defendants, manufacturers, wholesalers, and retail mail order houses and chain operators, is identical. The claim asserted in the complaint is a conspiracy between the defendants "to monopolize and attempt to monopolize" and fix the price of shoe repair supplies sold in interstate commerce in the Chicago area in violation of the Sherman Act, 15 U.S.C.A. §§ 1-7, 15 note. The allegations also include a price discrimination charge under the Robinson-Patman Act,

1. Rohlfing v. Cat's Paw Rubber Co., D.C.N.D.Ill., 17 F.R.D. 426, and Shaffer v. U. S. Rubber Co., D.C.N.D. Ill., 99 F. Supp. 886.
2. The figures indicated refer to the number of parties at the time of the petition for mandamus. When the action was originally filed there were 87 plaintiffs and 25 defendants.

15 U.S.C.A. §§ 13, 13a, 13b, 21a. Shaffer[3] involves six plaintiffs, all wholesalers of shoe repair supplies, and six defendants, including manufacturers and wholesalers of such supplies and a retail shoe shop chain operator. The allegations here also include charges of monopoly and price fixing under the Sherman Act and price discrimination in violation of the Robinson-Patman Act. Both complaints pray for injunctive relief, treble damages, and an accounting with respect to the discriminatory price differentials charged.

The record indicates that the cases had been burdensome to the petitioner. In Rohlfing alone, 27 pages of the record are devoted to docket entries reflecting that petitioner had conducted many hearings on preliminary pleas and motions. The original complaint had been twice amended as a result of orders of the court in regard to misjoinders and severance; 14 defendants had been dismissed with prejudice; summary judgment hearings had resulted in a refusal to enter a judgment for some of the defendants on the pleadings; over 50 depositions had been taken; and, hearings to compel testimony and require the production and inspection of records were held. It appears that several of the hearings were extended and included not only oral argument but submission of briefs, and resulted in the filing of opinions and memoranda by the petitioner. It is reasonable to conclude that much time would have been saved at the trial had petitioner heard the case because of his familiarity with the litigation.

The References to the Master. — The references to the master were made under the authority of Rule 53(b) of the

3. The figures indicated refer to the number of parties at the time of the petition for mandamus. When the action was originally filed there were 10 plaintiffs and 20 defendants.

Federal Rules of Civil Procedure.[4] The cases were called on February 23, 1955, on a motion to reset them for trial, Rohlfing was "No. 1 below the black line" on the trial list which gave it a preferred setting. All parties were anxious for an early trial but plaintiffs wished an adjournment until May. The petitioner announced that "it has taken a long time to get this case at issue. I remember hearing more motions, I think, in this case than in any case I have ever sat on in this court." The plaintiffs estimated that the trial would take six weeks, whereupon petitioner stated he did not know when he could try the case "if it is going to take this long." He asked if the parties could agree "to have a master hear" it. The parties ignored this query and at a conference in chambers the next day petitioner entered the orders of reference *sua sponte*.[5] The orders declared that the court was "confronted with an extremely congested calendar" and that "exception [*sic*] conditions exist for this reason" requiring

4. Rule 53(b) provides:

"(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

5. The fact that the master is an active practitioner would make the comment of Chief Justice Vanderbilt with regard to the effect of references appropriate here. In his work, "Cases and Materials on Modern Procedure and Judicial Administration," 1952, at pages 1240-1241, he states:

"There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all-too-prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as referee. Only a drastic administrative rule, rigidly enforced, strictly limiting the matters in which a reference may be had and requiring weekly reports as to the progress of each reference will put to rout this inveterate enemy of dispatch in the trial of cases."

the references. The cases were referred to the master "to take evidence and to report the same to this Court, together with his findings of fact and conclusions of law." It was further ordered in each case that "the Master shall commence the trial of this cause" on a certain date and continue with diligence, and that the parties supply security for costs. While the parties had deposited some $8,000 costs, the record discloses that all parties objected to the references and filed motions to vacate them. Upon petitioner's refusal to vacate the references, these mandamus actions were filed in the Court of Appeals seeking the issuance of writs ordering petitioner to do so. These applications were grounded on 28 U.S.C. § 1651(a), 28 U.S.C.A. §1651(a), the All Writs Act.[6] In his answer to the show cause orders issued by the Court of Appeals the petitioner amplified the reasons for the references stating "that the cases were very complicated and complex, that they would take considerable time to try," and that his "calendar was congested." Declaring that the references amounted to [226 F. 2d 705] "a refusal on his [petitioner's] part, as a judge, to try the causes in due course," the Court of Appeals concluded that "in view of the extraordinary nature of these causes", the references must be vacated "if we find that the orders were beyond the court's power under the pertinent rule." And, if being so found, the writs issued under the authority of the All Writs Act. It is not disputed that the same principles and considerations as to the propriety of the issuance of the writs apply equally to the two cases.

6. "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principle of law."

[2, 3] *The Power of the Courts of Appeals.* — Petitioner contends that the power of the Courts of Appeals does not extend to the issuance of writs of mandamus to review interlocutory orders except in those cases where the review of the case on appeal after final judgment would be frustrated. Asserting that the orders of reference were in exercise of his jurisdiction under Rule 53(b), petitioner urges that such action can be reviewed only on appeal and not by writ of mandamus, since by congressional enactment appellate review of a District Court's orders may be had only after a final judgment. The question of naked power has long been settled by this Court. As late as Roche v. Evaporated Milk Association, 1943, 319 U. S. 21, 63 S. Ct. 938, 941, 87 L. Ed. 1185, Mr. Chief Justice Stone reviewed the decisions and in considering the power of Courts of Appeals to issue writs of mandamus, the Court held that "the common-law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court." The recodification of the All Writs Act in 1948, which consolidated old §§ 342 and 377 into the present § 1651(a), did not affect the power of the Courts of Appeals to issue writs of mandamus in aid of jurisdiction. See Bankers Life & Casualty Co. v. Holland, 1953, 346 U. S. 379, 382-383, 74 S. Ct. 145, 147-148, 98 L. Ed. 106. Since the Court of Appeals could at some stage of the antitrust proceedings entertain an appeal in these cases it has power in proper circumstances as here to issue writs of mandamus reaching them. Roche, supra, 319 U. S. at page 25, 63 S. Ct. at page 941, and cases there cited. This is not to say that the conclusion we reach on the facts of this case is intended or can be used to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders. We pass on then to the only real question involved, i.e., whether

the exercise of the power by the Court of Appeals was proper in the cases now before us.

[4] *The Discretionary Use of the Writs.* — It appears from the docket entries to which we heretofore referred that the petitioner was well informed as to the nature of the antitrust litigation, the pleadings of the parties, and the gist of the plaintiffs' claims. He was well aware of the theory of the defense and much of the proof which necessarily was outlined in the various requests for discovery, admissions, interrogatories, and depositions. He heard arguments on motions to dismiss, to compel testimony on depositions, and for summary judgment. In fact, petitioner's knowledge of the cases at the time of the references, together with his long experience in the antitrust field, points to the conclusion that he could dispose of the litigation with greater dispatch and less effort than anyone else. Nevertheless, he referred both suits to a master on the general issue. Furthermore, neither the existence of the alleged conspiracy nor the question of liability *vel non* had been determined in either case. These issues, as well as the damages, if any, and the question concerning the issuance of an injunction were likewise included in the references. Under all of the circumstances we believe the Court of Appeals was justified in finding the orders of reference were an abuse of the petitioner's power under Rule 53(b). They amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation.

[5, 6] The use of masters is "to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause," Ex parte Peterson, 1920, 253 U. S. 300,

312, 40 S. Ct. 543, 547, 64 L. Ed. 919, and not to displace the court. The exceptional circumstances here warrant the use of the extraordinary remedy of mandamus. See State of Maryland v. Soper, 1926, 270 U.S. 9, 30, 46 S. Ct. 185, 189, 70 L. Ed. 449. As this Court pointed out in Los Angeles Brush Mfg. Corp. v. James, 1927, 272 U. S. 701, 706, 47 S. Ct. 286, 288, 71 L. Ed. 481: "* * * [W]here the subject concerns the enforcement of the * * * [r]ules which by law it is the duty of this court to formulate and put in force," mandamus should issue to prevent such action thereunder as is so palpably improper as to place it beyond the scope of the rule invoked. As was said there at page 707 of 272 U.S., at page 289 of 47 S. Ct., were the court "* * * to find that the rules have been practically nullified by a District Judge * * * it would not hesitate to restrain [him] * * *." The Los Angeles Brush Mfg. Corp. case was cited as authority in 1940 for a *per curiam* opinion in McCullough v. Cosgrave, 309 U.S. 634, 60 S. Ct. 703, 84 L.Ed. 992, in which the Court summarily ordered vacated the reference of two patent cases to a master. The cases arose from the same District Court in which the Los Angeles Brush Mfg. Corp. case originated and the grounds for the references largely followed that case. It is to be noted that the grounds there are much more inclusive than those set out here, alleging all of those claimed by the petitioner and, in addition, the prolonged illness of the regular judge and the fact that no other judge was available to try the cases. It appears to us *a fortiori* that these cases were improperly referred to a master.

It is claimed that recent opinions of this Court are to the contrary. Petitioner cites Bankers Life & Casualty Co. v. Holland, 1953, 346 U.S. 379, 74 S. Ct. 145, 98 L.Ed. 106, and

Parr v. United States, 1956, 351 U.S. 513, 76 S.Ct. 912. The former case did not concern rules promulgated by this Court but, rather, an Act of Congress; the venue statute. Furthermore, there we pointed out that the "* * * All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' * * *." 346 U.S. at page 383, 74 S. Ct. at page 148. Certainly, as the Court of Appeals found here, there was a clear abuse of discretion. In the Parr case, the District Court had not exceeded or refused to exercise its functions. It dismissed an indictment because the Government had elected to prosecute Parr in another district under a new indictment. The effect of the holding was merely that the dismissal of the first indictment was not an abuse of the discretion vested in the trial judge.

[7-10] It is also contended that the Seventh Circuit has erroneously construed the All Writs Act as "conferring on it a 'roving commission' to supervise interlocutory orders of the District Courts in advance of final decision." Our examination of its opinions in this regard leads us to the conclusion that the Court of Appeals has exercised commendable self-restraint. It is true that mandamus should be resorted to only in extreme cases since it places trial judges in the anomalous position of being litigants without counsel other than uncompensated volunteers. However, there is an end of patience and it clearly appears that the Court of Appeals has for years admonished the trial judges of the Seventh Circuit that the practice of making references "does not commend itself" and "* * * should seldom be made, and if at all only when unusual circumstances exist." In re Irving-Austin Building Corp., 7 Cir., 1938, 100 F.2d 574, 577. Again in 1942 it pointed out that the words "exception" and "excep-

tional" as used in the reference rule are not elastic terms with the trial court the sole judge of their elasticity. "Litigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown." Adventures in Good Eating, Inc. v. Best Places to Eat, Inc., 7 Cir., 131 F.2d 809, 815. Still the Court of Appeals did not disturb the reference practice by reversal or mandamus until this case was decided in October 1955. Again, Chief Judge Duffy in Krinsley v. United Artists Corp., 7 Cir., 1956, 235 F.2d 253, 257, in which there was an affirmance of a case involving a reference, called attention to the fact that the practice of referring cases to masters was "* * * all too common in the Northern District of Illinois * * *." The record does not show to what extent references are made by the full bench of the District Court in the Northern District; however, it does reveal that petitioner has referred 11 cases to masters in the past 6 years. But even "a little cloud may bring a flood's downpour" if we approve the practice here indulged, particularly in the face of presently congested dockets, increased filings, and more extended trials. This is not to say that we are neither aware of nor fully appreciate the unfortunate congestion of the court calendar in many of our District Courts. The use of procedural devices in the heavily congested districts have proven to be most helpful in reducing docket congestion. Illustrative of such techniques are provision for an assignment commissioner to handle the assignment of all cases; the assignment of judges to handle only motions, pleas, and pre-trial proceedings; and separate calendars for civil and criminal trials in cases that have reached issue. We enumerate these merely as an example of the progress made in judicial administration through the use of enlightened procedural techniques. It goes without saying

that they can be used effectively only where adaptable to the specific problems of a district. But, be that as it may, congestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test, present congestion would make references the rule rather than the exception. Petitioner realizes this for an addition to calendar congestion he alleges that the cases referred had unusual complexity of both issues of fact and law. But most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before the court. On the contrary, we believe that this is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work. Nor does petitioner's claim of the great length of time these trials will require offer exceptional grounds. The final ground asserted by petitioner was with reference to the voluminous accounting which would be necessary in the event the plaintiffs prevailed. We agree that the detailed accounting required in order to determine the damages suffered by each plaintiff might be referred to a master after the court has determined the overall liability of defendants, provided the circumstances indicate that the use of the court's time is not warranted in receiving the proof and making the tabulation.

We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here. Its judgment is therefore affirmed.

Affirmed.

Mr. Justice BRENNAN, with whom Mr. Justice FRANKFURTER, Mr. Justice BURTON and Mr. Justice HARLAN join, dissenting.

The issue here is not whether Judge La Buy's order was reviewable by the Court of Appeals. The sole question is whether review should have awaited final decision in the cause or whether the order was reviewable before final decision by way of a petition under the All Writs Act for the issuance of a writ of mandamus addressed to it. I do not agree that the writ directing Judge La Buy to vacate the order of reference was within the bounds of the discretionary power of the Court of Appeals to issue an extraordinary writ under the All Writs Act.[1] Only last Term, in Parr v. United States, 351 U.S. 513, 76 S. Ct. 912, this Court restated those bounds:

> "The power to issue them is discretionary and it is sparingly exercised. * * * This is not a case where a court has exceeded or refused to exercise its jurisdiction, see Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26, 63 S. Ct. 938, 941, 87 L.Ed. 1185, nor one where appellate review will be defeated if a writ does not issue, cf. State of Maryland v. Soper, 270 U.S. 9, 29-30, 46 S. Ct. 185, 189, 70 L.Ed. 449. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. Roche v. Evaporated Milk Ass'n, supra, 319 U.S. at page 30, 63

1. "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (a), 28 U.S.C.A. § 1651(a).

S. Ct. at page 943." 351 U.S. at page 520, 76 S. Ct. at page 917.[2]

The action of the Court of Appeals for the Seventh Circuit here under review is outside these limitations. The case before the Court of Appeals was "not a case where a court has exceeded or refused to exercise its jurisdiction * * *" Rule 53(b) of the Federal Rules of Civil Procedure vested Judge La Buy with discretionary power to make a reference if he found, and he did, that "some exceptional condition" required the reference.[3] Here also "the most that could be claimed is that the district [court] * * * erred in ruling on matters within [its] jurisdiction." If Judge La Buy erred in finding that there was an "exceptional condition" requiring the reference or did not give proper weight to the caveat of the Rule that a "reference to a master shall be the exception and not the rule," that was mere error "in ruling on matters within [the District Court's] jurisdiction." Such mere error does not bring into play the power of the Court of Appeals to issue an extraordinary writ. Nor did Judge

2. Cf. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106; Ex parte Fahey, 332 U.S. 258, 67 S. Ct. 1558, 91 L. Ed. 2041.

3. It should be noted that the objection to references stated by Chief Justice Vanderbilt, as quoted in footnote 5 of the majority opinion, is reflected in New Jersey Revised Rules 4:54-1, which provides as follows: "No reference for the hearing of a matter shall be made to a master, except under extraordinary circumstances, *upon approval of the chief Justice*, or for the taking of a deposition, or as to matters heard by a standing master appointed by the Supreme Court." (Emphasis added.) If the federal rule required a like consent by a chief judge, a reference without such consent would be outside the jurisdiction of the District Court, and therefore, subject to correction by writ of mandamus. The vital distinction is that the federal rule as presently framed vests discretion in the District Courts.

La Buy's order of reference present the Court of Appeals with a case "where appellate review will be defeated if a writ does not issue." The litigants may suffer added expense and possible delay in obtaining a decision as a consequence of the reference, but Roche settles that "that inconvenience is one which we must take if Congress contemplated in providing that only final judgments should be reviewable."[4]

But, regrettable as is this Court's approval of what I consider to be a clear departure by the Court of Appeals from the settled principles governing the issuance of the extraordinary writs, what this Court says in reaching its result is reason for particularly grave concern. I think this Court has today seriously undermined the long-standing statutory policy against piecemeal appeals. My brethren say: "Since the Court of Appeals could at some stage of the anti-trust proceedings entertain an appeal in these cases it has power in proper circumstances as here to issue writs of mandamus reaching them. * * * This is not to say that the conclusion we reach on the facts of this case is intended or can be used to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders." I understand this to mean that proper circumstances are present for the issuance of a writ in this case because, if the litigants are not now heard, the Court of Appeals will not have an opportunity to relieve them of the burden of the added expense and delay of decision alleged to be the consequence of the reference. But that bridge was crossed by this Court in Roche and Alkali, where this very argument was rejected: "Here the inconvenience to the litigates results alone from

4. 319 U.S. at page 30, 63 S.Ct. at page 943. Cf. United States Alkali Export Ass'n v. United States, 325 U.S. 196, 202-203, 65 S.Ct. 1120, 1124-1125, 89 L.Ed. 1554.

the circumstance that Congress has provided for review of the district court's order only on review of the final judgment, and not from an abuse of judicial power, or refusal to exercise it, which it is the function of mandamus to correct." 319 U.S. at page 31, 63 S. Ct. at page 944.

What this Court is saying, therefore, is that the All Writs Act confers an independent appellate power in the Courts of Appeals to review interlocutory orders. I have always understood the law to be precisely to the contrary. The power granted to the Court of Appeals by the All Writs Act is not an appellate power but merely an auxiliary power in aid of and to protect the appellate jurisdiction conferred by other provisions of law, e.g., the power to review final decisions granted by 28 U.S.C. § 1291, 28 U.S.C.A. § 1291,[5] and to review specified exceptional classes of interlocutory orders granted by 28 U.S.C. § 1292, 28 U.S.C.A. § 1292.[6] This holding that an independent appellate power is given by the All Writs Act not only discards the constraints upon the scope of the power to issue extraordinary writs restated in Parr, but, by the very fact of doing so, opens wide the crack in the door which, since the Judiciary Act of 1789, has shut out from intermediate appellate review all interlocutory actions of the District Courts not within the few exceptional classes now specified by the Congress in § 1292.

The power of the Courts of Appeals to issue extraordinary writs stems from § 14 of the Judiciary Act of 1789.[7] Chief

5. "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court," 28 U.S.C. § 1291, 28 U.S.C.A. § 1291.
6. Section 1292, in substance, confers upon the Courts of Appeals jurisdiction of appeals from interlocutory orders of the District Courts relating to injunctions, receivership, and certain admiralty and patent infringement cases.
7. 1 Stat. 81, substantially re-enacted in § 262 of the Judicial Code of 1911, 36 Stat. 1162.

Judge Magruder, in In re Josephson, 1 Cir., 218 F.2d 174, provides us with an invaluable history of this power and of the judicial development of its scope. He demonstrates most persuasively that "[t]he all writs section does not confer an independent appellate power; the power is strictly of an auxiliary nature, in aid of a jurisdiction granted in some other provision of law, as was sharply pointed out in Roche v. Evaporated Milk Ass'n, 1943, 319 U.S. 21, 29-31, 63 S. Ct. 938 [943-944]. * * *" 218 F.2d at page 180.

The local question posed for a Court of Appeals by a petition for the issuance of a writ is whether the action of the District Court tends to frustrate or impede the ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other provision of the law. The answer is clearly in the affirmative where, for example, the order of the District Court transfers a cause to a District Court of another circuit for decision. That was Josephson, where the Court of Appeals for the First Circuit held that an order of a District Court in the circuit transferring a case to the District Court of another circuit was within the reach of the Court of Appeals' power under the All Writs Act because "the effect of the order is that the district judge has declined to proceed with the determination of a case which could eventually come to this court by appeal from a 'final decision'."[8] 218 F.2d at page 181. In contrast, a District Court order denying a transfer would not come under the umbrella of power under the All Writs Act, since retention of the cause by the District Court can hardly thwart or tend to defeat the power of the Court of Appeals to review that

8. Accord, Wiren v. Laws, 90 U.S. App. D.C. 105, 194 F. 2d 873; Gulf Research & Development Co. v. Harrison, 9 Cir., 185 F. 2d 457.

order after final decision of the case. The distinction between the grant and denial of transfer was recognized in Carr v. Donohoe, 201 F.2d 426, where the Court of Appeals for the Eighth Circuit denied a petition for writ of mandamus directed to an order of a District Court transferring the cause to another District Court within the same circuit. The Court of Appeals properly noted that the order was merely a non-appealable interlocutory order in nowise impairing its actual or potential jurisdiction to review that and any other action after final decision, observing: "It seems obvious that the transfer of the * * * action * * * to [another district in the same circuit] cannot in any way impair or defeat the jurisdiction of this Court to review any appealable order or judgment which eventually may be entered in the case."[9] 201 F.2d at pages 428-429.

This Court's reliance upon Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701, 47 S. Ct. 286, 71 L. Ed. 481, and McCullough v. Cosgrave, 309 U.S. 634, 60 S. Ct. 703, 84 L. Ed. 992, is, in my opinion, misplaced. Those cases involved the power, not of the Courts of Appeals, but of this Court, to issue extraordinary writs. In Josephson, Chief Judge Magruder took pains to emphasize the "caution that decisions of the Supreme Court of the United States, at least prior to 1948, supporting the issuance, *by that Court*, of a writ of mandamus directed to a lower federal court, may not safely be relied upon by an intermediate court of appeals as au-

9. In the Josephson case, Chief Judge Magruder said much the same thing:

"If the district judge had held on to the case, *i.e.*, had denied the motion for transfer, such action would have preserved, not frustrated, any potential appellant jurisdiction which we might have had; and we are at a loss to understand how we could properly review on mandamus an order denying a transfer, on the pretense that such a review would be in 'aid' of our appellant jurisdiction." 218 F.2d at page 181.

thority for the issuance by the latter court of a writ of mandamus directed to a district court within the circuit. The reason is that the Supreme Court might have been exercising a different sort of power from the strictly auxiliary power given to us under the all writs section." 218 F.2d at page 179. This "different sort of power" derived from § 13 of the Judiciary Act of 1789, granting the Supreme Court power to issue writs of mandamus "in cases warranted by the principles and usages of law."[10] This provision, unlike the All Writs Act, was not restricted in its use to aiding the jurisdiction of the appellate court, and therefore might be deemed to have granted a broader power to this Court than that conferred on the Courts of Appeals by the latter statute.

Furthermore, Los Angeles Brush Mfg. Corp. was a case where a reference was made, not because a district judge decided that the particular circumstances of the particular case required a reference, but pursuant to an agreement among all the judges of that District Court always to appoint masters to hear patent cases regardless of the circumstances of particular cases. The McCullough situation was much the same. As that case was delimited in Roche, this Court was there confronted by a case of "the persistent disregard of the Rules of Civil Procedure * * * prescribed by this court." 319 U.S. at page 31, 63 S. Ct. at page 944.

The key to both Los Angeles Brush Mfg. Corp. and McCullough is found in the language in the former at 272 U.S. 706, 47 S. Ct. 288:

> "* * * we think it clear that, where the subject concerns the enforcement of the equity rules which by law it is the duty *of this court to formulate and put in force*, and in a case in which this court has the ulti-

10. 1. Stat. 80, substantially re-enacted in § 234 of the Judicial Code of 1911, 36 Stat. 1156.

mate discretion to review the case on its merits, it may use its power of mandamus and deal directly with the District Court in requiring it to conform to them." (Emphasis added.)

In other words, neither of those cases can be accepted as supporting what the Court of Appeals undertook to do here, both because of the absence in old § 234 of the "in aid of" jurisdiction limitation now contained in § 1651, and of anything approaching a wholesale disregard of the rules prescribed by this Court, such as was involved there. I subscribe fully to Chief Judge Magruder's conclusion in Josephson:

> "Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U.S.C. §1651 (28 U.S.C.A. § 1651) [the All Writs Act] grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit, and in particular to review by a writ of mandamus any unappealable order which we believe should be immediately reviewable in the interest of justice." 218 F.2d at page 177.

The view now taken by this Court that the All Writs Act confers an independent appellate power, although not so broad as "to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders," in effect engrafts upon federal appellate procedure a standard of interlocutory review never embraced by the Congress throughout our history, although it is written into the English Judi-

cature Act[11] and is followed in varying degrees in some of the States.[12] That standard allows interlocutory appeals by leave of the appellate court. It is the compromise between conflicting viewpoints as to the extent that interlocutory appeals should be allowed.[13] The federal policy of limited interlocutory review stresses the inconvenience and expense of piecemeal reviews and the strong public interest in favor of a single and complete trial with a single and complete review. The other view, of which the New York practice of allowing interlocutory review as of right from most orders is the extreme example, perceives danger of possible injustice in individual cases from the denial of any appellate review until after judgment at the trial.[14]

The polestar of federal appellate procedure has always been "finality," meaning that appellate review of most interlocutory actions must await final determination of the cause at the trial level. "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." Cobbledick v. United States, 309 U.S. 323, 324-325, 60 S. Ct. 540, 541, 84 L.Ed. 783. The Court's action today shatters that statutory policy. I protest not only because we invade a domain reserved by

11. Judicature Act, 1925, 15 & 16 Geo. 5, c. 49, § 31(1) (f).
12. E.g. Miss. Code Ann., 1942, § 1148; N.J. Rev. Rules 2:2-3.
13. See e.g., the discussion by Mr. Justice Jacobs in Appeal of Pennsylvania R. Co., 20 N.J. 398, 120 A.2d 94; Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539; Note, 50 Col. L. Rev. 1102; Note, 58 Yale L.J. 1186; Report, Special Meeting of Judicial Conference of the United States, p. 7 (March 20-21, 1952); Report, Regular Annual Meeting of Judicial Conference of the United States, p. 27 (1953).
14. N.Y. Civ. Prac. Act, § 609.

the Constitution exclusively to the Congress,[15] but as well because the encouragement to interlocutory appeals offered by this decision must necessarily aggravate further the already bad condition of calendar congestion in some of our District Courts and also add to the burden of work of some of our busiest Courts of Appeals. More petitions for interlocutory review, requiring the attention of the Courts of Appeals, add, of course, to the burden of work of those courts. Meanwhile final decision of the cases concerned is delayed while the District Courts mark time awaiting action upon the petitions. Rarely does determination upon interlocutory review terminate the litigation. Moreover, the District Court calendars become longer with the addition of new cases before older ones are decided. This, then, interposes one more obstacle to the strong effort being made to better justice through improved judicial administration.[16]

The power of the Court of Appeals to correct any error in Judge La Buy's reference is found exclusively in the power to review final decisions under § 1291. The Court of Appeals erred by assuming a nonexistent power under the All Writs Act to review this interlocutory order in advance of final decision. Insofar as the Court approves this error, I must respectfully dissent.

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15. U.S. Const., Art. III, § 1.

16. The seriousness of the problem of calendar congestion in both federal and state courts prompted the Attorney General of the United States, in May 1956, to call a conference on court congestion and delay. This conference resulted in the appointment of a distinguished committee to formulate a frontal attack upon the problem. Rogers, Towards Eliminating Delayed Justice, an address prepared for delivery before the Mid-Atlantic Regional Meeting of the American Bar Association, October 11, 1956.

(Per Curiam Opinion on Petition for Rehearing)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,630

Great Northern Railway Company, a corporation,
Relator-Petitioner,

vs.

Edward T. Hyde,
Plaintiff-Respondent,

Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Petition for Rehearing.

[March 7, 1957.]

Before SANBORN, WOODROUGH and WHITTAKER, Circuit Judges.

PER CURIAM

The opinion of this Court was filed December 18, 1956, 238 F.2d 852, holding that § 1651(a) of Title 28 U.S.C.A. was not available as a means for reviewing and reversing, for an erroneous exercise of discretion, an order transferring this action, under 28 U.S.C.A. § 1404(a) from the District of Minnesota to the Northern District of California for trial. On January 14, 1957, the Supreme Court decided in the case of *La Buy v. Howes Leather Co., Inc.*, 352 U.S. 249, that a nonappealable interlocutory order of a District Judge entered under Rule 53(b) of the Federal Rules of Civil Procedure, referring an antitrust case to a special master for trial, was reviewable and reversible for an abuse of discretion, because of 28 U.S.C.A. § 1651(a).

The relator-petitioner has petitioned this Court for a rehearing because implications which can be drawn from the *La Buy* decision have cast doubts upon the correctness and propriety of our disposition of the instant case. The petition for rehearing is granted.

The case will be set down for reargument at the May, 1957, session of the Court. The relator-petitioner may have until March 25 to file and serve its brief on reargument. The respondents may have until April 20 to file and serve an answering brief. Ten days thereafter will be allowed the relator-petitioner for a reply brief.

(Order Granting Petition of Petitioner for Rehearing.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 15,630
September Term, 1956. Thursday, March 7, 1957.

Great Northern Railway Company, a corporation,
Relator-Petitioner,

vs.

Edward T. Hyde,
Plaintiff-Respondent,

Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District Minnesota,
Respondents.

On Petition for Rehearing.

Ordered by the Court that petition of petitioner for rehearing is granted, and the case is set down for reargument at the May 1957 session. Petitioner may have until May 25th to file and serve brief on reargument; respondents until April 20th to file and serve answering brief, and reply brief of petitioner may be filed and served within ten days thereafter. Per curiam opinion filed.

March 7, 1957.

(Opinion Filed June 27, 1957.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,630

Great Northern Railway Company, a corporation,
Relator-Petitioner,

vs.

Edward T. Hyde,
Plaintiff-Respondent,

Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Rehearing of Application for Writ of Prohibition and Mandamus.

[June 27, 1957.]

D. E. Engle (Edwin C. Matthias and Anthony Kane were with him on the brief), for Relator-Petitioner.

Harry H. Peterson (Eugene A. Rerat was with him on the brief), for Plaintiff-Respondent and Respondents.

Before SANBORN, WOODROUGH and JOHNSEN, Circuit Judges.

SANBORN, Circuit Judge.

Upon the original submission of this application for a writ of prohibition and mandamus, this Court ruled that an order of Judge Bell transfering, under 28 U.S.C. § 1404 (a), the case of *Edward T. Hyde* v. *Great Northern Railway Company* from the District of Minnesota, where it was brought, to the Northern District of California (where it could have been brought) for trial, was not reviewable under 28 U.S.C. § 1651(a), for an erroneous exercise of discretion. We declined to prohibit the Judge from carrying into effect the transfer order, and refused to command him to transfer the case to the Western District of Washington. 238 F.2d 852.

Shortly after our opinion was filed, the Supreme Court decided *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249. It held in that case that the United States Court of Appeals for the Seventh Circuit had discretionary and supervisory power under the All Writs Act, 28 U.S.C. § 1651(a), to require Judge La Buy to vacate orders made under Rule 53(b) of the Federal Rules of Civil Procedure, referring two antitrust cases to a master for trial.

The petitioner in the instant case sought a rehearing upon the ground that the *La Buy* decision had, in effect, impliedly and inferentially demonstrated that this Court had erred in holding that the transfer order of Judge Bell was not reviewable under §1651(a). We granted a rehearing, and the case has been reargued.

There is much force in the petitioner's contention that, since the Court of Appeals for the Seventh Circuit had discretionary power to compel Judge La Buy to vacate his orders of reference, for abusing his discretion, this Court necessarily has discretionary power to compel, and should

compel, Judge Bell to vacate his order transferring the instant case to the Northern District of California, and to command him to transfer the case to the Western District of Washington.

Just how far the discretionary and supervisory power of a Court of Appeals, under § 1651(a), to deal with transfer orders made under § 1404(a) extends has not as yet been determined. We do not question our power to command the vacation of an order transferring a case to a district to which, as a matter of law, the case was not transferrable. Here we have an erroneous exercise of judicial discretion because the factual situation did not warrant the transfer of the case to the Northern District of California under § 1404(a).

The *La Buy* case, as the Supreme Court took pains to point out, presented an extreme situation of a District Judge abusing judicial power which "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." 352 U.S., at 256.

Here the District Judge has transferred a case for trial to a district in which it could have been brought, but to which, in our opinion, it could not properly have been transferred in view of the surrounding circumstances.

It may be that we are unduly reluctant to undertake the review of discretionary orders of transfer under §1404(a), involving, as they usually do, controversial fact questions as to where cases can most conveniently and appropriately be tried. If so, we shall hope to be corrected.

Notwithstanding the *La Buy* decision, we feel justified in adhering to our former views that our power to issue writs under §1651(a) does not warrant us to command

Judge Bell to vacate his order of transfer and to enter an order transferring the case to the Western District of Washington.

Application denied.

JOHNSEN, Circuit Judge, dissenting.

The original opinion in this case, 238 F.2d 852, held that, under the All Writs Act, 28 U.S.C.A. § 1651(a), a Court of Appeals has power or authority to issue a writ of mandamus or prohibition against a District Judge, only "to compel a District Judge to exercise a jurisdiction which the law has made it his duty to exercise, * * * or to prevent a judge from exercising a power that he clearly does not have." P. 857.

As indicated by the opinion, the panel of judges which rendered the decision was of the view that, if the act involved was a matter which the District Judge legally had power to do or to refuse to do, his action was in no way subject to being touched by a supervisory or auxiliary writ on the part of the Court of Appeals, even though the doing or refusing might otherwise amount to arbitrariness or abuse of discretion on the factual elements of the particular situation.

Hence, the panel refused, because of believed lack of power, to touch an order of the District Judge, made under 28 U.S.C.A. § 1404(a), denying a motion of the defendant for transfer of the case from St. Paul, Minnesota, to Seattle, Washington, and granting instead an alternative motion of the plaintiff "that in the event that the Court determines that the United States District Court, said District of Minne-

sota, Third Division, sitting at St. Paul, Minnesota, is not a proper venue for the trial of said cause, and only in that event, that the Court make its Order transferring said cause to the United States District Court for the Northern District of California, Southern Division, sitting at San Francisco, California."

The original opinion stated that "we believe that there was no adequate factual or legal basis for the transfer" made to San Francisco, and declared that, "If the order transferring the case were subject to review for an erroneous exercise of discretion, we would not hesitate to reverse the order and direct the District Court to transfer the case to Seattle, where the plaintiff's claim arose and where most of the persons reside who will be called to give evidence at the trial."

But, added the Court, "We are of the opinion, however, that the transfer order is not subject to review by prohibition or mandamus, despite the fact that it is not an appealable order and that an appeal from a final judgment in the case will be an inadequate remedy for the erroneous transfer." P. 855. And in summary it said that "We think that, in the interest of an expeditious, efficient and orderly administration of justice, controversies about venue should be finally settled and determined at the District Court level." P. 857.

On this rehearing of the case, granted after the decision of the Supreme Court in *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249, 77 S. Ct. 309, (and in which hearing I have been assigned to take the place of a member of the original panel), the majority of the Court have adhered to the views expressed in the previous opinion, saying "We do not question our power to command the vacation

of an order transferring a case to a district to which, as a matter of law, the case was not transferrable. Here we have an erroneous exercise of judicial discretion because the factual situation did not warrant the transfer of the case to the Northern District of California under § 1404(a). • • • Here the District Judge has transferred a case for trial to a district in which it could have been brought, but to which, in our opinion, it could not properly have been transferred in view of the surrounding circumstances • • • Notwithstanding the *La Buy* decision, we feel justified in adhering to our former views that our power to issue writs under § 1651(a) does not warrant us to command Judge Bell to vacate his order of transfer and to enter an order transferring the case to the Western District of Washington."

This, in its effect, is a holding that a Court of Appeals is utterly without power, under the All Writs Act, to touch any order of a District Court, under § 1404(a), in the field of transfer, whether the order made is one in grant or in denial of a requested venue change, and whether it involves a transfer outside (as here) or within (see *Carr v. Donohoe*, 8 Cir., 201 F. 2d 426) the circuit, save only that the Court may "command the vacation of an order transferring a case to a district to which, as a matter of law, the case was not transferable".

I believe—certainly as to a transfer made outside the circuit at least, which is the situation here—that this holding of lack of power is in conflict with both the majority opinion and the minority opinion in the *La Buy* case.

As to our power to consider and correct the clear abuse of discretion, in which all of us on the panel agree that the trial court here engaged in sending the case to San

Francisco on the circumstances involved, I do not believe that any possible question can be viewed as existing under the majority opinion of the Supreme Court. And even under the narrower concept of power, than that recognized by the majority, which the minority felt that § 1651(a) should be regarded as allowing a Court of Appeals to exercise, the latter group said: "The focal point posed for a Court of Appeals by a petition for the issuance of a writ is whether the action of the District Court tends to frustrate or impede the ultimate exercise by a Court of Appeals of its appellate jurisdiction granted in some other provision of the law. The answer is clearly in the affirmative where, for example, the order of the District Court transfers a cause to a District Court of another circuit for decision". 352 U.S. at page 264, 77 S. Ct. at pages 317 and 318.

Thus, under both the majority and the minority concepts in the *La Buy* case, it seems to me that we manifestly have the power, and corollarily owe the duty, of nullifying by prohibition the transfer order which the District Court made, since, as the original opinion states, "there was no adequate factual or legal basis for the transfer, and, as the rehearing opinion reiterates, "the factual situation did not warrant the transfer of the case to the Northern District of California", and San Francisco was a place "to which, in our opinion, it could not properly have been transferred in view of the surrounding circumstances".

Whether we have the power to go further and to require the District Court by mandamus to transfer the case to Seattle (where we all agree that on the circumstances shown the case ought in the interest of justice to have its

trial) is a question that extends a degree beyond that involved in the matter of prohibiting a transfer to San Francisco. The minority opinion in the *La Buy* case probably must be read as not recognizing such a power. I interpret the expressions in the majority opinion, however, as impliedly recognizing power in a Court of Appeals to compel a District Judge to make a transfer out of the circuit, where on the circumstances his refusal to do so amounts legally to judicial arbitrariness or—in milder phrase—constitutes "a clear abuse of discretion".

Before discussing this aspect of the statute, I would add that, without regard to it, it is possible in any event, on a prohibiting of the transfer made to San Francisco, to leave the path open to the District Judge, by so expressly indicating, to reconsider the motion of the defendant for transfer of the case to Seattle. The Court's order of transfer to San Francisco was made under the condition of plaintiff's alternative motion that such action should be taken only "in the event that the Court determines that St. Paul, Minnesota, is not a proper venue for the trial". In granting the alternative motion, the Court thus must have been of the view that the case ought not to be retained in St. Paul for trial, (as we here all agree that it should not). Prohibition of the transfer made to San Francisco (for which at the minimum we have power and responsibility under the statute, in my reading of both the majority and the minority opinions in the *La Buy* case) would of itself in all likelihood result in the District Judge making transfer of the case to Seattle, if our opinion left no doubt as to our intent not to preclude him from reconsidering the defendant's motion.

But I do not think that we are required to stop here. As I have indicated, I am of the conviction that under the statute and the majority opinion in the *La Buy* case our power and our duty extend beyond this minimal concept. I believe that we have the power, not merely to prohibit the District Judge from transferring the case to San Francisco, but as well to direct him to make transfer of it to Seattle for trial.

As the majority opinion in the *La Buy case* points out, 352 U.S. at pages 257 and 258, 77 S. Ct. at page 314, the general test recognized and applied in the Court's previous decisions, for the existence and use of the power granted by the All Writs Act, is whether the thing sought to be commanded, or prohibited constitutes as a matter of law "usurpation of judicial power" or "clear abuse of discretion", on the part of the District Judge. Both are equal foundations under the Act for the existence of the power. And inherent in the exercise of the power under either is, in some measure at least, an element of supervisory responsibility on the part of the Courts of Appeals as to the District Courts, which cannot be escaped in the proper functioning of our federal judicial system. As the majority opinion said, 352 U.S. at pages 259 and 260, 77 S. Ct. at page 315, "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system".

I can see nothing in the All Writs Act that militates against a reading and application of it in relation to this concept. It should be noted that the language of the Act, that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appro-

priate in aid of their respective jurisdictions and agreeable to the usages and principles of law", is collective and not individualistic in its court specification. The statute does not say that each Court of Appeals (and each District Court) may issue writs only to preserve, foster or facilitate its own individual jurisdiction, but generally and collectively that writs are entitled to be issued by them in aid of their respective jurisdictions as such courts. In other words, it seems to me that the grant of power to them is as much one in their class or system significance as in their individual functioning.

This fact, I think, has even more apparency under the language of 28 U.S.C., 1940 ed., § 377, preceding the 1948 revision, that "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law". The Revisor's Note, 28 U.S.C.A. following § 1651, makes clear that the language used in § 1651, under the 1948 revision, was not intended to change the substance of the provision quoted but represented merely a change in phraseology.

It is on the basis of the concept of the statute which I have expressed that I regard us as having the power in the present situation to go beyond merely prohibiting the transfer attempted to San Francisco, and to direct the transfer, which should have been made, to Seattle. As a member of the Courts of Appeals system and in my responsibility for the achievement of justice thereunder, I am as much concerned about whether a case pending in this circuit, to which the jurisdiction of this Court thus

projectively or constructively has an existing tie and reach, has unwarrantedly been denied a transfer to another circuit, as about whether the case has improperly been made the subject of such an outside transfer.

Equally in both situations, an injustice is being perpetrated in this circuit—a judicial wrong for which, as the original opinion in the present case admits, 238 F. 2d at page 855, "an appeal from a final judgment in the case will be an inadequate remedy". If the injustice attendant upon an unwarranted grant or denial of a transfer is to be prevented in the federal judicial system (and it should be remembered that § 1404(a) does not say that the action of the District Court shall be final), it can only be done through a use of the power vested in the Courts of Appeals, under the All Writs Act, to aid or facilitate generally their jurisdiction or review function. The presence of a case in the judicial channel of a circuit to me sufficiently provides the tie or reach of constructive jurisdiction necessary to give rise to the existence of the power in the Court of Appeals for the circuit. And the correction of the injustice done by an unwarranted grant or denial of a transfer, whose harm cannot ordinarily be otherwise eliminated, is, it seems to me, in its relationship to the achieving of a fair result in the case, a matter that properly can be regarded, under the statute, as being in aid of a Court of Appeals' constructive jurisdiction or the accomplishing of its review function.

I have indicated that I view the statute as meaning, and the majority opinion in the *La Buy* case as recognizing, that the Courts of Appeals have power under the All Writs Act to command or prohibit any act on the part of a District Judge, which constitute as a matter of law

either "usurpation of judicial power" or "clear abuse of discretion", where such act is one which is capable of affecting the result in the case, and whose harm an appeal from the final judgment is not practicably capable of undoing. An unwarranted granting or denial of a transfer will ordinarily fall in that category.

This does not mean, however, that I think there is a right to bother a Court of Appeals in every situation of grant or denial of transfer by the District Court. Usurpation of judicial power, such as an attempt to transfer a case to a district or division where it could not have been brought, or clear abuse of discretion in granting or denying the transfer, amounting to legal arbitrariness, must exist as a basis for the Court of Appeals' exercise of its power under the All Writs Act in such a situation. A Court of Appeals must not assume to use the All Writs Act simply to set its judgment up against that of the District Court. If the facts of the situation reasonably afford a basis for variance in judgment, and if the judgment exercised by the District Court is not without rational ground on the circumstances a. a whole, there is no right whatsoever in the Court of Appeals to interfere.

Moreover, it must be borne in mind that, beyond these tests, there also is an element of sound discretion, which a Court of Appeals has the right and duty to exercise in relation to the issuance of any extraordinary writ. For example, a situation might exist in which the District Court had been guilty of a clear abuse of discretion on the facts, but in which the Court of Appeals was not impressed as to the likelihood of any grave or substantial harm being done thereby. The Courts of Appeals should properly lean toward such and other guarded restraint in

their exercise of extraordinary writ power. They must not allow themselves to become guilty of needlessly curbing or compelling action on the part of the District Court or of delaying that Court's work and functions. In other words, their exercise of power under the All Writs Act must be such as to make it clear to the bar that they will not engage in the entertainment of loose applications for intermediate writs, and that such a writ can be hoped to be obtained only in extreme, flagrant and compelled cases, where the interests of justice realistically impress as having been substantially prejudiced.

These cautions have been sought to be impressed in the majority opinion in the *La Buy* case, and I shall not discuss them further. They are a bit outside what is necessary to my dissent from the holding of the majority in the present situation. That holding is, as I have previously pointed out, that there exists no power in a Court of Appeals under the All Writs Act to touch any order of the District Court relating to transfer, whether in grant or denial thereof, except only that the transfer of a case to a place where the action could not have been brought may properly be prohibited. An arbitrary or unwarranted transfer of a case to another circuit, such as is the situation here, is not under the majority opinion subject to reach by a Court of Appeals under the All Writs Act.

In summary, I think this holding of lack of power to prohibit the unwarranted transfer attempted to San Francisco is legally untenable, and I also believe that we have the power to direct the District Court to make transfer of the case to Seattle, which we all agree ought to be its proper trial situs in the circumstances shown.

(JUDGMENT)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,630
September Term, 1956. Thursday, June 27, 1957.

Great Northern Railway Company, a corporation, Relator-Petitioner, vs. Edward T. Hyde, Plaintiff-Respondent, Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota, Respondents.	On Application for Writ of Prohibition and Mandamus.

This cause came on to be heard on the Application of Relator-Petitioner, Great Northern Railway Company, for a Writ of Prohibition and Mandamus, after rehearing granted March 7, 1957, and was reargued by counsel.

After due consideration, It is now here Ordered and Adjudged by this Court, that the judgment of this Court entered December 18, 1956, in this matter, be, and the same is hereby, vacated, set aside and held for naught.

It is further Ordered and Adjudged by this Court, on the opinion filed December 18, 1956, and the majority opinion filed June 27, 1957, after rehearing granted, that the Application of the Defendant, Great Northern Railway Company, a Corporation, in the United States District Court for the District of Minnesota, for a Writ prohibiting the transfer of the Plaintiff's (Edward T. Hyde) case to the Northern District of California and directing its transfer to the Western District of Washington, be, and is by this Court, hereby denied.

And it is further Ordered and Adjudged by this Court that the Alternative Writ of Prohibition and the Alternative Writ of Mandamus heretofore issued by this Court in this matter be, and they are each hereby, discharged and dismissed.

June 27, 1957.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,630

Great Northern Railway Company, a corporation,
Relator-Petitioner,
vs.
Edward T. Hyde,
Plaintiff-Respondent,
vs.
Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

Order for Stay Pending Review on Certiorari to the United States Supreme Court

WHEREAS, it appears from the petition of Edwin C. Matthias, Anthony Kane and D. E. Engle on file herein that the relator-petitioner Great Northern Railway Company intends to apply to the United States Supreme Court for a writ of certiorari in this case,

NOW, THEREFORE, it is hereby ordered that all proceedings in the above-entitled matter are hereby stayed until the 16th day of August, 1957, pending application to the United States Supreme Court for a writ of certiorari. Provided that if within such stay there is filed with the Clerk of this Court the certificate of the Clerk of the United States

Supreme Court that the petition for certiorari, record and brief have been filed, such stay shall continue until final disposition by the United States Supreme Court.

DATED the 3 day of July, 1957.

BY THE COURT:
JOHN B. SANBORN
United States Court of Appeals Judge

(Clerk's Certificate.)

United States Court of Appeals
for the
Eighth Circuit

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains printed record on which petition for writs of prohibition and mandamus was heard and determined in said Court of Appeals in the case of Great Northern Railway Company, a Corporation, Relator-Petitioner, vs. Edward T. Hyde, Plaintiff-Respondent, Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota, Respondents, No. 15630, together with full, true and complete copies of Opinion of said Court of Appeals filed December 18, 1956; vacated judgment of said Court of Appeals of December 18, 1956; motion of relator-petitioner for leave to file petition for rehearing and supporting affidavit of D. E. Engle; order of said Court of Appeals entered February 6, 1957, granting motion of relator-petitioner for leave to file petition for rehearing, peti-

tion of relator-petitioner for rehearing filed February 15, 1957; per curiam opinion of said Court of Appeals on petition for rehearing, filed March 7, 1957; order of said Court of Appeals entered March 7, 1957, granting petition for rehearing; majority and dissenting opinions filed in said Court of Appeals on June 27, 1957; judgment of said Court of Appeals entered June 27, 1957; and order of said Court of Appeals entered July 3, 1957, staying proceedings pending petition to Supreme Court, U. S., for writ of certiorari.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit at office in the City of St. Louis, Missouri, on the 2nd day of August, A. D. 1957.

(SEAL)

E. E. KOCH
Clerk of the United States Court of Appeals for the Eighth Circuit.
By (Signed)
LILLIAN W. McDERMOTT
Deputy Clerk

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IN THE

Supreme Court of the United States

October Term, 1957

No. 423

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Petitioner,

vs.

EDWARD T. HYDE,
Respondent,

vs.

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and the Other Judges and Officers of the United States District Court, District of Minnesota.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1957

No. ——

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Petitioner,

vs.

EDWARD T. HYDE,
Respondent,

vs.

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and the Other Judges and Officers of the United States District Court, District of Minnesota.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To The Honorable Supreme Court of the United States:

Petitioner, Great Northern Railway Company, respectfully prays that a writ of certiorari issue to review the judg-

ment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on June 27, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit dated December 18, 1956, is reported in 238 F.(2d) 852. It is therein stated that this case would seem to be an appropriate one in which to apply for certiorari. The opinion on rehearing of the United States Court of Appeals for the Eighth Circuit dated June 27, 1957, is not yet reported in the official reports. The opinions are printed in the appendix hereto, *infra*, App. 12 and App. 25, respectively.

JURISDICTION

The original judgment of the Court of Appeals was entered December 18, 1956 (App. 23) and the judgment on rehearing was entered June 27, 1957 (App. 38). The judgment entered June 27, 1957, vacated and set aside the judgment entered December 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether 28 U.S.C. 1651(a) confers supervisory control and power upon the Courts of Appeals to review an interlocutory order of a District Court transferring the venue of a case under 28 U.S.C. 1404(a) when the Court of Appeals finds that there was no adequate factual or legal basis for the transfer.

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. 1651(a) and 28 U.S.C. 1404(a). They are printed in the appendix, *infra*, App. 11.

STATEMENT

Respondent, Edward T. Hyde, (hereinafter referred to as "plaintiff") commenced an action on February 23, 1956, against the Petitioner, Great Northern Railway Company, (hereinafter referred to as "defendant") in the United States District Court for the District of Minnesota to recover damages for personal injuries suffered at Seattle, Washington. The action was brought under the provisions of 45 U.S.C. 51, et seq. (R. 1).

The defendant denied liability (R. 7) and moved the court for an order under 28 U.S.C. 1404(a) transferring the case to the United States District Court, Western District of Washington, for trial at Seattle, the city where the accident occurred and witnesses necessary for the trial resided (R. 8). This motion was heard before Judge Bell at which time the plaintiff suggested that if the court concluded that the case should not be tried in St. Paul that it be transferred to the United States District Court, Southern District of California, for trial at Los Angeles.

Judge Bell ordered the case transferred to Los Angeles, a location where no witnesses resided and a district where the defendant was not doing business. The defendant moved for a rehearing which was granted. Prior to the argument on rehearing the plaintiff filed a motion opposing the transfer to Seattle but asking the court to transfer the case to the Northern District of California, for trial at San Francisco, if

the court should decide that St. Paul was not the proper venue (R. 47). Judge Bell ordered the case transferred to San Francisco, also a location where no witnesses resided although a district where the defendant was doing business (R. 64).

The defendant on August 6, 1956, petitioned the Court of Appeals for the Eighth Circuit for alternative writs of prohibition and mandamus which were subsequently issued (R. 65, 79, 82).

The matter was argued before the Court of Appeals which filed its opinion and judgment December 18, 1856 (R. 1A App. 12). The defendant's aplication for a writ prohibiting the transfer to San Francisco and a writ of mandamus directing a transfer to Seattle was denied "upon the sole ground that the transfer order complained of by the defendant is not reviewable [by a Court of Appeals] by prohibition, mandamus or otherwise." In rendering this opinion the Court removed every fact issue from the case when it stated on p. 855:

> "• • we believe that there was no adequate factual or legal basis for the transfer. If the order transferring the case were subject to review for an erroneous exercise of a sound discretion, we would not hesitate to reverse the order and direct the District Court to transfer the case to Seattle, • •."

A petition for rehearing was granted on the ground implications could be drawn from *LaBuy v. Howes Leather Co., Inc.*, 352 U.S. 249, decided January 14, 1957, which casts doubts upon the correctness and propriety of the opinion and judgment filed December 18, 1956 (R. 45A).

The matter was reargued before the Court of Appeals which filed its opinion and judgment on rehearing on June

27, 1957 (App. 25). This judgment vacated the judgment entered December 18, 1956, and again denied defendant's application for writs of prohibition and mandamus on the ground that the Court had no power to issue the writs and that the *LaBuy* decision did not alter the Court's original opinion. Judge Johnsen dissented (R. 51A).

REASONS FOR GRANTING THE WRIT

The decision below is a refusal of the Court of Appeals to exercise supervisory control of the District Court necessary for proper judicial administration in the federal system and to correct a judicial wrong for which the court below admits "an appeal from a final judgment in the case will be an inadequate remedy" *(Great Northern Railway Company v. Hyde,* 238 F(2) 852, 855; App. 17).

The decision of the Court of Appeals of the Eighth Circuit that it has no power to correct the judicial wrong in this case by way of mandamus and prohibition presents a direct conflict with decisions in other circuits upon an issue of procedural law of major importance in the administration of justice in the federal courts. It is clearly in conflict in principle with applicable decisions of this Court.

The necessity for settlement by this Court of the question herein presented is set forth by Judge Sanborn in the December 18, 1956, opinion of the court below. Therein he stated on p. 857, App. 22:

> "It is unfortunate that the question of the reviewability of a transfer order under Sec. 1651(a) has not as yet been put at rest. The Supreme Court, in *Norwood v. Kirkpatrick,* 349 U.S. 29, 33, 75 S. Ct. 544, 99 L. Ed. 789, found it unnecessary to determine whether mandamus or prohibition was a proper remedy to test the

validity of a transfer order. The instant case squarely presents that question and it would seem to be an appropriate case in which to apply for certiorari."

Judge Sanborn again reiterated this position in the opinion on rehearing dated June 27, 1957 (App. 27):

"It may be that we are unduly reluctant to undertake the review of discretionary orders of transfer under Sec. 1404(a), * * *. If so, we shall hope to be corrected."

Conflict Among the Circuits

The court below decided that under 28 U.S.C. 1651(a) it did not have either the power to review an order of a district court granting a motion under 28 U.S.C. 1404(a) for a transfer to another circuit or the power to direct the district court to transfer the case to the proper district for trial despite it's finding that there was no adequate factual or legal basis for the district court's order. This holding is in direct conflict with the decisions of the following Courts of Appeals:

Second Circuit—	*Ford Motor Co. v. Ryan,* 182 F(2) 329
Fifth Circuit—	*Atlantic Coast Line R. Co. v. Davis,* 185 F(2) 766
Sixth Circuit—	*Nicol v. Koscinski,* 188 F(2) 537
Seventh Circuit—	*Chicago, R. I. & P. R. Co. v. Igoe,* 212 F(2) 378

Ninth Circuit—	*Shapiro v. Bonanza Hotel Co.*, 185 F(2) 777
D. C. Circuit—	*Wiren v. Laws*, 194 F(2) 873

The various Courts of Appeals in the cases cited above held under similar circumstances that they had jurisdiction under Sec. 1651(a) to review orders of a district court either refusing to direct a transfer or granting a transfer to another circuit entered under Sec. 1404(a).

A contrary conclusion to the decisions above cited was reached by the Third Circuit in *All States Freight v. Modarelli*, 196 F(2) 1010; Fourth Circuit in *Clayton v. Warlick*, 232 F(2) 699; and the Eighth Circuit in the instant case. They held that they did not have the power to review by way of Sec 1651(a) an order of a district court under Sec. 1404(a) even though the Court abused its discretion in entering the order. The First Circuit in *In re Josephson*, 218 F(2) 174 at p. 183 served notice that "except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus."

The Court below recognized the divergence of opinion among the circuits when it stated in its opinion at p. 856, App. 20):

> "We find ourselves in complete accord with the opinion in *Clayton v. Warlick*, supra. As Chief Judge Parker says in that opinion, the expressions of the various circuits with respect to the reviewability of orders of transfer under § 1404(a), through the use of § 1651(a) are in hopeless conflict."

The conflict among the various circuits places litigants under identical situations in vastly different positions concerning the availability of mandamus under Sec. 1651(a) as a method of review of an order under Sec. 1404(a) depending upon the circuit in which the case is pending. These conflicts would necessarily be resolved by a review of the instant case by this Court.

Conflict With Decisions of This Court

Judge Johnsen pointed out in his dissenting opinion in the court below that the majority opinion is in conflict with both the majority and the minority opinions in *LaBuy v. Howes Leather Co., Inc.*, 352 U.S. 249. He stated (App. 30):

> "As to our power to consider and correct the clear abuse of discretion, in which all of us on the panel agree that the trial court here engaged in sending the case to San Francisco on the circumstances involved, I do not believe that any possible question can be viewed as existing under the majority opinion of the Supreme Court."

The *LaBuy* case was decided January 14, 1957, and held that a discretionary interlocutory order issued by a district court referring an anti-trust case to a master under Rule 53(b) was reviewable by a Court of Appeals under 28 U.S.C. 1651(a).

This Court held in the *LaBuy* decision on p. 255:

> "* * The question of naked power [of the Courts of Appeals to issue writs of mandamus to review interlocutory orders] has long been settled by this Court. As late as *Roche v. Evaporated Milk Association*, 319 U.S. 21 (1943), Mr. Chief Justice Stone reviewed the decisions and, in considering the power of the Courts of

Appeals to issue writs of mandamus, the Court held that 'the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court.' Id., at 25. The recodification of the All Writs Act in 1948, which consolidated old §§342 and 377 into the present § 1651(a), did not affect the power of the Courts of Appeals to issue writs of mandamus in aid of jurisdiction. See *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-383 (1953)."

There is no distinguishing feature between the instant case and the *LaBuy* case. Each involves review of a discretionary interlocutory order under 28 U.S.C. 1651(a). Each involves an abuse of judicial discretion by a district court which cannot be remedied or corrected on appeal from final judgment.

Even aside from the *LaBuy* case as this Court pointed out in that decision, it has long been the law a Court of Appeals has the power to issue the writs prayed for in the instant case. See *Roche v. Evaporated Milk Association*, 319 U.S. 21 and *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379.

The decision below is a refusal of the Court of Appeals to exercise supervisory control over the District Courts which in the *LaBuy* decision this Court held was necessary for the proper administration of the judicial system. It fosters further confusion among the Court of Appeals concerning a federal jurisdictional and procedural issue. The decision imposes upon this defendant and future litigants in the same or similar circumstances a judicial wrong which can only be corrected by the procedure approved by this Court under 28 U.S.C. 1651(a), there being no adequate remedy on appeal from final judgment.

CONCLUSION

It is respectfully submitted that because of the importance of the question involving a federal jurisdictional and procedural issue, and the existing conflicts among the circuits and with decisions of this Court, and because of the statements of the Court of Appeals of the Eighth Circuit of its desire to have this case reviewed by this Court, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Statutes Involved

28 U.S.C. 1404(a)

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. 1651(a)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Opinion of Lower Court (December 18, 1956)
Great Northern Railway Company v. Hyde,
238 F (2) 852

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,630

Great Northern Railway Company, a corporation,
Relator-Petitioner,

vs.

Edward T. Hyde,
Plaintiff-Respondent,

Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Application for Writ of Prohibition and Mandamus.

(December 18, 1956)

Don E. Engle (Edwin C. Matthias and Anthony Kane were with him on the brief,) for Relator-Petitioner.

Harry H. Peterson (Eugene A. Rerat was with him on the brief), for Plaintiff-Respondent and Respondents.

Before Sanborn, Woodrough and Whittaker, Circuit Judges.

Sanborn, Circuit Judge.

The vital question for decision in this case is whether Sec. 1651(a) of 28 U.S.C.[1] furnishes a means for reviewing an order of the District Court, not otherwise reviewable, transferring, under Sec. 1404(a) of 28 U.S.C.,[2] from the District of Minnesota to the Northern District of California a personal injury case arising out of an accident which occurred in the City of Seattle, Washington. We are asked to prohibit Judge Bell, acting for the United States District Court for the District of Minnesota, from effectuating his order transferring the case to the Northern District of California, and to command him to transfer it to the Western District of Washington for trial at Seattle.

The following are the facts upon which the application of the Great Northern Railway Company for a writ of prohibition and mandamus are based:

Edward T. Hyde, while working as a switch foreman for the Great Northern Railway Company in its yard at Seattle, on November 5, 1955, was seriously injured. He employed a Minneapolis attorney and brought an action on February 23, 1956, against the Railway Company, under the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 et seq., in the United States District Court for the District of Minnesota, Third Division, to recover damages for his injuries. His claim was that the accident resulted from the negligence

[1] "Sec. 1651 Writs.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[2] "Sec. 1404. Change of venue.

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

of the defendant and a violation by it of the Federal Safety Appliance Act.

The defendant on March 16, 1956, filed its answer, denying liability, and gave notice of a motion to transfer the case, under Sec. 1404(a), to the Western District of Washington, for trial at Seattle. The motion was based upon affidavits showing that, for the convenienceof material witnesses and the saving of unnecessary expense to the defendant, Seattle, where the accident occurred, where the plaintiff resided at the time of the accident, and where he received medical and hospital care and treatment from the time of his injury to January 30, 1956, was the most convenient and appropriate place for the trial of the case.

In opposition to the defendant's motion, counsel for the plaintiff lodged with the court an affidavit stating that the defendant had its home office in Minnesota, where it was incorporated; that the burden of producing medical evidence was on the plaintiff; and that such evidence was as readily available in Minnesota as elsewhere. An affidavit of the plaintiff's wife, also lodged with the court, stated that from November 6, 1955, to January 30, 1956, the plaintiff was in a hospital at Seattle under the care of a Great Northern Railway Company physician; that, upon the physician's recommendation, the plaintiff was transferred to the Veteran's Hospital at Long Beach, California, for treatment, and has been there since February 1, 1956; that she and the plaintiff had decided to make California their home; that, because of his injuries, it is very difficult for the plaintiff to travel; that it would be better if the trial of this case could be had in the city of Los Angeles, California; that she and the plaintiff "would prefer that the case be tried in St. Paul, Minnesota, for the reason that when her said husband is discharged from

the Veterans' Hospital in Long Beach, it is her intention to bring him to the State of Minnesota for medical examinations and further treatment, and" she "feels that if the case cannot be tried in the City of St. Paul, State of Minnesota, that it would be more convenient for her said husband if the case could be transferred to the State of California," for trial at Los Angeles.

On May 28, 1956, a hearing was had before Judge Bell on the motion of the defendant for a transfer of the case to the Western District of Washington and the opposition of the plaintiff and his request or suggestion that if the court determined that the case should not be tried in the District of Minnesota, the transfer be to the Southern District of California, Central Division.

Judge Bell on June 20, 1956, denied the motion of the defendant to transfer the case to the Western District of Washington, and, instead, transferred it to the Southern District of California, for trial at Los Angeles.

The defendant on June 26, 1956, moved Judge Bell for an order staying the effect of his transfer order of June 20, 1956, upon the ground, among others, that there had been no showing that the action could have been brought in the Southern District of California. The motion for a stay was granted. On July 3, 1956, the United States District Court for the Southern District of California, on motion of the defendant, returned the case to the District of Minnesota.

On July 17, 1956, Judge Bell granted a motion of the defendant for a rehearing of its motion for a transfer of the case to the Western District of Washington. Thereafter on July 28, 1956, the plaintiff filed a motion opposing the transfer, but asking the court to transfer the case to the Northern District of California, for trial at San Francisco, if the court

should decide that the District of Minnesota was not the proper venue.

The rehearing of the defendant's motion to transfer the case to the Western District of Washington, for trial at Seattle, and the hearing of the motion of the plaintiff that, if transferred at all, the case be transferred to the Northern District of California, for trial at San Francisco, came on before Judge Bell on July 31, 1956. On August 2, 1956, he filed an order denying the defendant's motion and transferring the case to the Northern District of California.

The General Offices of the defendant are in St. Paul, Minnesota, where the case would have been for trial had it not been transferred. St. Paul adjoins Minneapolis, where the attorney for the plaintiff resides and has his office, but is otherwise unrelated in any way to the plaintiff's action or the claim upon which it is based.

The city of San Francisco, where it is conceded the plaintiff's action could have been brought, is nearer the Veterans' Hospital at Long Beach than is Seattle or St. Paul. St. Paul, however, is farther from Long Beach than is Seattle. Aside from the proximity of San Francisco to Long Beach, where the plaintiff and his wife have resided since he entered the Veterans' Hospital, San Francisco has no connection with his action.

Judge Bell, in his return to the defendant's application for a writ of prohibition and mandamus, states that, in transferring the case to the Northern District of California, the court properly exercised the judicial power and discretion vested in it by Sec. 1404(a), and that the order of transfer was in accordance with that section "in that it was for the convenience of the parties and witnesses, in the interest of justice."

While we do not question the sincerity of the belief of Judge Bell that the transfer of the plaintiff's case for trial at San Francisco was made in the exercise of a sound judicial discretion and in conformity with the letter and spirit of Sec. 1404(a), we believe that there was no adequate factual or legal basis for the transfer. If the order transferring the case were subject to review for an erroneous exercise of a sound discretion, we would not hesitate to reverse the order and direct the District Court to transfer the case to Seattle, where the plaintiff's claim arose and where most of the persons reside who will be called to give evidence at the trial. We are of the opinion, however, that the transfer order is not subject to review by prohibition or mandamus, despite the fact that it is not an appealable order and that an appeal from a final judgment in the case will be an inadequate remedy for the erroneous transfer.

This Court held in *Carr v. Donohoe*, 201 F. 2d 426, that Sec. 1651(a) of 28 U.S.C. did not furnish a means for reviewing an order transferring an action from one District to another District within this Circuit. We think there is no controlling distinction between the *Carr* case and the instant case so far as the question of reviewability, under Sec. 1651(a), of transfer orders is concerned. In the *Carr* case we pointed to the intracircuit transfer merely to show that there was no possibility of the appellate jurisdiction of this Court being affected in any way by such a transfer.

In the case of *In re Josephson*, 1 Cir. 218 F. 2d 174, the United States Court of Appeals for the First Circuit, in dealing with the question of reviewability of a transfer order, said in an opinion by Chief Judge Magruder (page 181 of 218 F. 2d):

"* * * But assuming that if the transfer order is ever to be reviewed it must be now, we do not forget that appellate review is not of the essence of due process. See *McKane v. Durston*, 1894, 153 U.S. 684, 687, 14 S. Ct. 913, 38 L. Ed. 867. Particularly, there may be strong reasons of policy why litigation should not be delayed by appellate review of an administrative order of the sort here involved. It is not unlike an order by a federal district court remanding a case to the state court from which it had been removed. Here Congress has specifically provided that such an order 'is not reviewable on appeal or otherwise.' 28 U.S.C. Sec. 1447(d), as amended. In certain situations, the fact that a prejudicial order unless presently reviewable can never be corrected on appeal may be a consideration bearing on whether the order is to be deemed a 'final decision' from which an appeal may be taken under 28 U.S.C. Sec. 1291. See *Cobbledick v. United States*, 1940, 309 U. S. 323, 328-330, 60 S. Ct. 540, 84 L. Ed. 783. But we do not have such a situation here, since it is conceded that the transfer order now in question is an unappealable interlocutory order."

The position taken by the First Circuit in that case is stated on page 183 of 218 F. 2d, as follows:

"Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus."

Substantially the same position had been taken by the Third Circuit in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010. Judge Goodrich, who wrote the opinion in that case, after stating the truism that "Every litigant against

whom the transfer issue is decided naturally thinks the judge was wrong," said:

> "We do not propose to grant such review where the judge in the district court has considered the interests stipulated in the statute and decided thereon. * * *"

He concluded the opinion as follows:

> "We realize that the view we express is not the one which some of our judicial brethren are following with regard to this statute. But we cannot escape the conclusion that it will be highly unfortunate if the result of an attempted procedural improvement is to subject parties to two lawsuits: first, prolonged litigation to determine the place where a case is to be tried; and, second, the merits of the alleged cause of action itself."

The Fourth Circuit, in a recent opinion by Chief Judge Parker in the case of *Clayton v. Warlick*, 232 F. 2d 699, has held that, while mandamus or prohibition will lie to compel a District Judge to exercise the discretion conferred upon him by Sec. 1404(a) or to prevent him from transferring a case to a District to which, as a matter of law, it is not transferable, Sec. 1651(a) does not afford a means for the review of an order such as that here involved. The court said (page 706 of 232 F. 2d):

> "The correct rule to be applied, we think, is the same as that applied in the case of other interlocutory orders, i.e., where the judge has exercised a power, conferred upon him by law, mandamus may not be availed of to review the exercise of the power in the face of the restriction placed by Congress on the review of interlocutory orders. The distinction which we think applicable was that drawn by the Supreme Court in *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217, 65 S. Ct. 1130, 1133, 89 L. Ed. 1566, where the court said:

"'When Congress withholds interlocutory reviews, Sec. 262 [now 28 U.S.C. Sec. 1651] can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of Sec. 262.'

"See also the concurring opinion of Judge Swan in *Ford Motor Co. v. Ryan*, 2 Cir., 182 F. 2d 329, 332, and the decision of the Court of Appeals of the Second Circuit in *Ward Baking Co. v. Holtzoff*, 2 Cir., 164 F. 2d 34, 36 where the court said:

"'Section 262 of the Judicial Code, 28 U.S.C.A. Sec. 377 [now 28 U.S.C. Sec. 1651] cannot be availed of to correct a mere error in the exercise of conceded judicial power, but may be used to prevent usurpation of power, if "the lower court is clearly without jurisdiction."'"

We find ourselves in complete accord with the opinion in *Clayton v. Warlick*, supra. As Chief Judge Parker says in that opinion, the expressions of the various circuits with respect to the reviewability of orders of transfer under Sec. 1404(a), through the use of Sec. 1651(a), are in hopeless conflict.

This Court has, perhaps, been more conservative than other courts of appeals in resisting the use of Sec. 1651(a) as a device for reviewing nonappealable interlocutory orders. In an opinion written for this Court by Judge Walter H. Sanborn in 1927, in *Hosey v. Kennamer*, 8 Cir., 21 F. 2d 64, 65, he said:

"* * * When a question has been decided by the officer, or person to whose judgment or discretion the law has intrusted its determination, the writ of mandamus may

not issue to review or reverse that decision or to compel another." It may issue to command judicial officers to hear and to decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment, because such action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officer or officers to whose judgment and discretion the law intrusted the decision of the issue. For the same reason it cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision. *Kimberlin v. Commission to Five Cirilized Tribes* (C.C.A.) 104 F. 653, 655; *Henderson Tire & Rubber Co. v. Reeves & Otis, Judges* (C.C.A. 14 F. (2d) 903, 906; *Minnesota Moline Plow Co. v. Dowagiac Mfg. Co.* (C.C.A.) 126 F. 746, 748; *Brictson Mfg. Co. v. Munger, Judge* (C.C.A. 20 F. (2d) 793."

See, also: *Sound Investment & Realty Co. v. Harper*, 8 Cir., 178 F. 2d 274; *Larsen v. Nordbye*, 8 Cir., 181 F. 2d 765; *Larsen v. Switzer*, 8 Cir., 183 F. 2d 850; *Leimer v. Reeves*, 8 Cir., 184 F. 2d 441; *Hydraulic Press Mfg. Co. v. Moore*, 8 Cir., 185 F. 2d 800, 802-803; *Petsel v. Riley*, 8 Cir., 192 F. 2d 954.

This Court has used its power to issue writs of mandamus or prohibition to compel a District Judge to exercise a jurisdiction which the law has made it his duty to exercise (*Barber Asphalt Paving Co. v. Morris*, 8 Cir., 132 F. 945, 956) or to prevent a judge from exercising a power that he clearly does not have. We have studiously refrained from using mandamus to tell a judge what decision he must make in the exercise of a jurisdiction and discretion intrusted to him by law.

The Supreme Court has said:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. * * * As extraordinary remedies, they are reserved for really extraordinary cases."

Ex Parte Fahey, 332 U.S. 258, 259-260; *Ex Parte Collett*, 337 U.S. 55, 72. We do not regard controversies between litigants, and between their counsel, as to where a case can most conveniently, fairly, efficiently and economically be tried as "really extraordinary."

It is unfortunate that the question of the reviewability of a transfer order under Sec. 1651(a) has not as yet been put at rest. The Supreme Court, in *Norwood v. Kirkpatrick*, 349 U.S. 29, 33, found it unnecessary to determine whether mandamus or prohibition was a proper remedy to test the validity of a transfer order. The instant case squarely presents that question and it would seem to be an appropriate case in which to apply for certiorari.

So far as this Court is concerned, we shall hereafter grant leave to apply for mandamus or prohibition to review transfer orders if and when an Act of Congress or a decision of the Supreme Court requires us to do so. We think that, in the interest of an expeditious, efficient and orderly administration of justice, controversies about venue should be finally settled and determined at the District Court level.

The application of the defendant for a writ prohibiting the transfer of the plaintiff's case to the Northern District of California and directing its transfer to the Western District of Washington, is denied upon the sole ground that the transfer order complained of by the defendant is not reviewable here by prohibition, mandamus or otherwise.

Application denied.

VACATED

Judgment of Lower Court (December 18, 1956)

(JUDGMENT)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15630—September Term, 1956.
Tuesday, December 18, 1956.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Relator-Petitioner,

vs.

EDWARD T. HYDE,
Plaintiff-Respondent,

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Application for Writ of Prohibition and Mandamus.

This cause came on to be heard on the Application of Relator-Petitioner, Great Northern Railway Company, for a Writ of Prohibition and Mandamus, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Application of the Defendant, Great Northern Railway Company, a Corporation, in the United States District Court for the District of Minnesota, for a Writ prohibiting the transfer of the Plaintiff's (Edward T. Hyde) case to the Northern District of California and directing its transfer to the Western District of Washington, be and is by this Court hereby denied upon the sole ground that the transfer order complained of by the Defendant is not reviewable in this Court by prohibition, mandamus, or otherwise.

And it is further Ordered and Adjudged by this Court that the Alternative Writ of Prohibition and the Alternative Writ of Mandamus heretofore issued by this Court in this matter be, and they are each hereby, discharged and dismissed.

December 18, 1956.

Opinion of Lower Court (June 27, 1957)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,630

Great Northern Railway Company, a corporation,
Relator-Petitioner,

vs.

Edward T. Hyde,
Plaintiff-Respondent,

Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Rehearing of Application for Writ of Prohibition and Mandamus.

[June 27, 1957.]

D. E. Engle (Edwin C. Matthias and Anthony Kane were with him on the brief), for Relator-Petitioner.

Harry H. Peterson (Eugene A. Rerat was with him on the brief), for Plaintiff-Respondent and Respondents.

Before SANBORN, WOODROUGH and JOHNSEN, Circuit Judges.

SANBORN, Circuit Judge.

Upon the original submission of this application for a writ of prohibition and mandamus, this Court ruled that an order of Judge Bell transfering, under 28 U.S.C. § 1404 (a), the case of *Edward T. Hyde* v. *Great Northern Railway Company* from the District of Minnesota, where it was brought, to the Northern District of California (where it could have been brought) for trial, was not reviewable under 28 U.S.C. § 1651(a), for an erroneous exercise of discretion. We declined to prohibit the Judge from carrying into effect the transfer order, and refused to command him to transfer the case to the Western District of Washington. 238 F.2d 852.

Shortly after our opinion was filed, the Supreme Court decided *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249. It held in that case that the United States Court of Appeals for the Seventh Circuit had discretionary and supervisory power under the All Writs Act, 28 U.S.C. § 1651(a), to require Judge La Buy to vacate orders made under Rule 53(b) of the Federal Rules of Civil Procedure, referring two antitrust cases to a master for trial.

The petitioner in the instant case sought a rehearing upon the ground that the *La Buy* decision had, in effect, impliedly and inferentially demonstrated that this Court had erred in holding that the transfer order of Judge Bell was not reviewable under §1651(a). We granted a rehearing, and the case has been reargued.

There is much force in the petitioner's contention that, since the Court of Appeals for the Seventh Circuit had discretionary power to compel Judge La Buy to vacate his orders of reference, for abusing his discretion, this Court necessarily has discretionary power to compel, and should

compel, Judge Bell to vacate his order transferring the instant case to the Northern District of California, and to command him to transfer the case to the Western District of Washington.

Just how far the discretionary and supervisory power of a Court of Appeals, under § 1651(a), to deal with transfer orders made under § 1404(a) extends has not as yet been determined. We do not question our power to command the vacation of an order transferring a case to a district to which, as a matter of law, the case was not transferrable. Here we have an erroneous exercise of judicial discretion because the factual situation did not warrant the transfer of the case to the Northern District of California under § 1404(a).

The *La Buy* case, as the Supreme Court took pains to point out, presented an extreme situation of a District Judge abusing judicial power which "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." 352 U.S., at 256.

Here the District Judge has transferred a case for trial to a district in which it could have been brought, but to which, in our opinion, it could not properly have been transferred in view of the surrounding circumstances.

It may be that we are unduly reluctant to undertake the review of discretionary orders of transfer under §1404(a), involving, as they usually do, controversial fact questions as to where cases can most conveniently and appropriately be tried. If so, we shall hope to be corrected.

Notwithstanding the *La Buy* decision, we feel justified in adhering to our former views that our power to issue writs under §1651(a) does not warrant us to command

Judge Bell to vacate his order of transfer and to enter an order transferring the case to the Western District of Washington.

Application denied.

JOHNSEN, Circuit Judge, dissenting.

The original opinion in this case, 238 F.2d 852, held that, under the All Writs Act, 28 U.S.C.A. § 1651(a), a Court of Appeals has power or authority to issue a writ of mandamus or prohibition against a District Judge, only "to compel a District Judge to exercise a jurisdiction which the law has made it his duty to exercise, * * * or to prevent a judge from exercising a power that he clearly does not have." P. 857.

As indicated by the opinion, the panel of judges which rendered the decision was of the view that, if the act involved was a matter which the District Judge legally had power to do or to refuse to do, his action was in no way subject to being touched by a supervisory or auxiliary writ on the part of the Court of Appeals, even though the doing or refusing might otherwise amount to arbitrariness or abuse of discretion on the factual elements of the particular situation.

Hence, the panel refused, because of believed lack of power, to touch an order of the District Judge, made under 28 U.S.C.A. § 1404(a), denying a motion of the defendant for transfer of the case from St. Paul, Minnesota, to Seattle, Washington, and granting instead an alternative motion of the plaintiff "that in the event that the Court determines that the United States District Court, said District of Minne-

sota, Third Division, sitting at St. Paul, Minnesota, is not a proper venue for the trial of said cause, and only in that event, that the Court make its Order transferring said cause to the United States District Court for the Northern District of California, Southern Division, sitting at San Francisco, California."

The original opinion stated that "we believe that there was no adequate factual or legal basis for the transfer" made to San Francisco, and declared that, "If the order transferring the case were subject to review for an erroneous exercise of discretion, we would not hesitate to reverse the order and direct the District Court to transfer the case to Seattle, where the plaintiff's claim arose and where most of the persons reside who will be called to give evidence at the trial."

But, added the Court, "We are of the opinion, however, that the transfer order is not subject to review by prohibition or mandamus, despite the fact that it is not an appealable order and that an appeal from a final judgment in the case will be an inadequate remedy for the erroneous transfer." P. 855. And in summary it said that "We think that, in the interest of an expeditious, efficient and orderly administration of justice, controversies about venue should be finally settled and determined at the District Court level." P. 857.

On this rehearing of the case, granted after the decision of the Supreme Court in *La Buy v. Howes Leather Co., Inc.*, 352 U.S. 249, 77 S. Ct. 309, (and in which hearing I have been assigned to take the place of a member of the original panel), the majority of the Court have adhered to the views expressed in the previous opinion, saying: "We do not question our power to command the vacation

of an order transferring a case to a district to which, as a matter of law, the case was not transferrable. Here we have an erroneous exercise of judicial discretion because the factual situation did not warrant the transfer of the case to the Northern District of California under § 1404(a). * * * Here the District Judge has transferred a case for trial to a district in which it could have been brought, but to which, in our opinion, it could not properly have been transferred in view of the surrounding circumstances * * * Notwithstanding the *La Buy* decision, we feel justified in adhering to our former views that our power to issue writs under § 1651(a) does not warrant us to command Judge Bell to vacate his order of transfer and to enter an order transferring the case to the Western District of Washington."

This, in its effect, is a holding that a Court of Appeals is utterly without power, under the All Writs Act, to touch any order of a District Court, under § 1404(a), in the field of transfer, whether the order made is one in grant or in denial of a requested venue change, and whether it involves a transfer outside (as here) or within (see *Carr* v. *Donohoe*, 8 Cir., 201 F. 2d 426) the circuit, save only that the Court may "command the vacation of an order transferring a case to a district to which, as a matter of law, the case was not transferable".

I believe—certainly as to a transfer made outside the circuit at least, which is the situation here—that this holding of lack of power is in conflict with both the majority opinion and the minority opinion in the *La Buy* case.

As to our power to consider and correct the clear abuse of discretion, in which all of us on the panel agree that the trial court here engaged in sending the case to San

Francisco on the circumstances involved, I do not believe that any possible question can be viewed as existing under the majority opinion of the Supreme Court. And even under the narrower concept of power, than that recognized by the majority, which the minority felt that § 1651(a) should be regarded as allowing a Court of Appeals to exercise, the latter group said: "The focal point posed for a Court of Appeals by a petition for the issuance of a writ is whether the action of the District Court tends to frustrate or impede the ultimate exercise by a Court of Appeals of its appellate jurisdiction granted in some other provision of the law. The answer is clearly in the affirmative where, for example, the order of the District Court transfers a cause to a District Court of another circuit for decision". 352 U.S. at page 264, 77 S. Ct. at pages 317 and 318.

Thus, under both the majority and the minority concepts in the *La Buy* case, it seems to me that we manifestly have the power, and corollarily owe the duty, of nullifying by prohibition the transfer order which the District Court made, since, as the original opinion states, "there was no adequate factual or legal basis for the transfer, and, as the rehearing opinion reiterates, "the factual situation did not warrant the transfer of the case to the Northern District of California", and San Francisco was a place "to which, in our opinion, it could not properly have been transferred in view of the surrounding circumstances".

Whether we have the power to go further and to require the District Court by mandamus to transfer the case to Seattle (where we all agree that on the circumstances shown the case ought in the interest of justice to have its

trial) is a question that extends a degree beyond that involved in the matter of prohibiting a transfer to San Francisco. The minority opinion in the *La Buy* case probably must be read as not recognizing such a power. I interpret the expressions in the majority opinion, however, as impliedly recognizing power in a Court of Appeals to compel a District Judge to make a transfer out of the circuit, where on the circumstances his refusal to do so amounts legally to judicial arbitrariness or—in milder phrase—constitutes "a clear abuse of discretion".

Before discussing this aspect of the statute, I would add that, without regard to it, it is possible in any event, on a prohibiting of the transfer made to San Francisco, to leave the path open to the District Judge, by so expressly indicating, to reconsider the motion of the defendant for transfer of the case to Seattle. The Court's order of transfer to San Francisco was made under the condition of plaintiff's alternative motion that such action should be taken only "in the event that the Court determines that St. Paul, Minnesota, is not a proper venue for the trial". In granting the alternative motion, the Court thus must have been of the view that the case ought not to be retained in St. Paul for trial (as we here all agree that it should not). Prohibition of the transfer made to San Francisco (for which at the minimum we have power and responsibility under the statute, in my reading of both the majority and the minority opinions in the *La Buy* case) would of itself in all likelihood result in the District Judge making transfer of the case to Seattle, if our opinion left no doubt as to our intent not to preclude him from reconsidering the defendant's motion.

But I do not think that we are required to stop here. As I have indicated, I am of the conviction that under the statute and the majority opinion in the *La Buy* case our power and our duty extend beyond this minimal concept. I believe that we have the power, not merely to prohibit the District Judge from transferring the case to San Francisco, but as well to direct him to make transfer of it to Seattle for trial.

As the majority opinion in the *La Buy case* points out, 352 U.S. at pages 257 and 258, 77 S. Ct. at page 314, the general test recognized and applied in the Court's previous decisions, for the existence and use of the power granted by the All Writs Act, is whether the thing sought to be commanded or prohibited constitutes as a matter of law "usurpation of judicial power" or "clear abuse of discretion", on the part of the District Judge. Both are equal foundations under the Act for the existence of the power. And inherent in the exercise of the power under either is, in some measure at least, an element of supervisory responsibility on the part of the Courts of Appeals as to the District Courts, which cannot be escaped in the proper functioning of our federal judicial system. As the majority opinion said, 352 U.S. at pages 259 and 260, 77 S. Ct. at page 315, "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system".

I can see nothing in the All Writs Act that militates against a reading and application of it in relation to this concept. It should be noted that the language of the Act, that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appro-

priate in aid of their respective jurisdictions and agreeable to the usages and principles of law", is collective and not individualistic in its court specification. The statute does not say that each Court of Appeals (and each District Court) may issue writs only to preserve, foster or facilitate its own individual jurisdiction, but generally and collectively that writs are entitled to be issued by them in aid of their respective jurisdictions as such courts. In other words, it seems to me that the grant of power to them is as much one in their class or system significance as in their individual functioning.

This fact, I think, has even more apparency under the language of 28 U.S.C., 1940 ed., § 377, preceding the 1948 revision, that "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law". The Revisor's Note, 28 U.S.C.A. following § 1651, makes clear that the language used in § 1651, under the 1948 revision, was not intended to change the substance of the provision quoted but represented merely a change in phraseology.

It is on the basis of the concept of the statute which I have expressed that I regard us as having the power in the present situation to go beyond merely prohibiting the transfer attempted to San Francisco, and to direct the transfer, which should have been made, to Seattle. As a member of the Courts of Appeals system and in my responsibility for the achievement of justice thereunder, I am as much concerned about whether a case pending in this circuit, to which the jurisdiction of this Court thus

projectively or constructively has an existing tie and reach, has unwarrantedly been denied a transfer to another circuit, as about whether the case has improperly been made the subject of such an outside transfer.

Equally in both situations, an injustice is being perpetrated in this circuit—a judicial wrong for which, as the original opinion in the present case admits, 238 F. 2d at page 855, "an appeal from a final judgment in the case will be an inadequate remedy". If the injustice attendant upon an unwarranted grant or denial of a transfer is to be prevented in the federal judicial system (and it should be remembered that § 1404(a) does not say that the action of the District Court shall be final), it can only be done through the use of the power vested in the Courts of Appeals, under the All Writs Act, to aid or facilitate generally their jurisdiction or review function. The presence of a case in the judicial channel of a circuit to me sufficiently provides the tie or reach of constructive jurisdiction necessary to give rise to the existence of the power in the Court of Appeals for the circuit. And the correction of the injustice done by an unwarranted grant or denial of a transfer, whose harm cannot ordinarily be otherwise eliminated, is, it seems to me, in its relationship to the achieving of a fair result in the case, a matter that properly can be regarded, under the statute, as being in aid of a Court of Appeals' constructive jurisdiction or the accomplishing of its review function.

I have indicated that I view the statute as meaning, and the majority opinion in the *La Buy* case as recognizing, that the Courts of Appeals have power under the All Writs Act to command or prohibit any act on the part of a District Judge, which constitute as a matter of law

either "usurpation of judicial power" or "clear abuse of discretion", where such act is one which is capable of affecting the result in the case, and whose harm an appeal from the final judgment is not practicably capable of undoing. An unwarranted granting or denial of a transfer will ordinarily fall in that category.

This does not mean, however, that I think there is a right to bother a Court of Appeals in every situation of grant or denial of transfer by the District Court. Usurpation of judicial power, such as an attempt to transfer a case to a district or division where it could not have been brought, or clear abuse of discretion in granting or denying the transfer, amounting to legal arbitrariness, must exist as a basis for the Court of Appeals' exercise of its power under the All Writs Act in such a situation. A Court of Appeals must not assume to use the All Writs Act simply to set its judgment up against that of the District Court. If the facts of the situation reasonably afford a basis for variance in judgment, and if the judgment exercised by the District Court is not without rational ground on the circumstances as a whole, there is no right whatsoever in the Court of Appeals to interfere.

Moreover, it must be borne in mind that, beyond these tests, there also is an element of sound discretion, which a Court of Appeals has the right and duty to exercise in relation to the issuance of any extraordinary writ. For example, a situation might exist in which the District Court had been guilty of a clear abuse of discretion on the facts, but in which the Court of Appeals was not impressed as to the likelihood of any grave or substantial harm being done thereby. The Courts of Appeals should properly lean toward such and other guarded restraint in

their exercise of extraordinary writ power. They must not allow themselves to become guilty of needlessly curbing or compelling action on the part of the District Court or of delaying that Court's work and functions. In other words, their exercise of power under the All Writs Act must be such as to make it clear to the bar that they will not engage in the entertainment of loose applications for intermediate writs, and that such a writ can be hoped to be obtained only in extreme, flagrant and compelled cases, where the interests of justice realistically impress as having been substantially prejudiced.

These cautions have been sought to be impressed in the majority opinion in the *La Buy* case, and I shall not discuss them further. They are a bit outside what is necessary to my dissent from the holding of the majority in the present situation. That holding is, as I have previously pointed out, that there exists no power in a Court of Appeals under the All Writs Act to touch any order of the District Court relating to transfer, whether in grant or denial thereof, except only that the transfer of a case to a place where the action could not have been brought may properly be prohibited. An arbitrary or unwarranted transfer of a case to another circuit, such as is the situation here, is not under the majority opinion subject to reach by a Court of Appeals under the All Writs Act.

In summary, I think this holding of lack of power to prohibit the unwarranted transfer attempted to San Francisco is legally untenable, and I also believe that we have the power to direct the District Court to make transfer of the case to Seattle, which we all agree ought to be its proper trial situs in the circumstances shown.

Judgment Appealed From (June 27, 1957)

(JUDGMENT)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,630
September Term, 1956. Thursday, June 27, 1957.

Great Northern Railway Company, a corporation,
Relator-Petitioner,

vs.

Edward T. Hyde,
Plaintiff-Respondent,

Honorable Robert C. Bell, Judge of the United States District Court, District of Minnesota, and The Other Judges and Officers of the United States District Court, District of Minnesota,
Respondents.

On Application for Writ of Prohibition and Mandamus.

This cause came on to be heard on the Application of Relator-Petitioner, Great Northern Railway Company, for a Writ of Prohibition and Mandamus, after rehearing granted March 7, 1957, and was reargued by counsel.

After due consideration, It is now here Ordered and Adjudged by this Court, that the judgment of this Court entered December 18, 1956, in this matter, be, and the same is hereby, vacated, set aside and held for naught.

It is further Ordered and Adjudged by this Court, on the opinion filed December 18, 1956, and the majority opinion filed June 27, 1957, after rehearing granted, that the Application of the Defendant, Great Northern Railway Company, a Corporation, in the United States District Court for the District of Minnesota, for a Writ prohibiting the transfer of the Plaintiff's (Edward T. Hyde) case to the Northern District of California and directing its transfer to the Western District of Washington, be, and is by this Court, hereby denied.

And it is further Ordered and Adjudged by this Court that the Alternative Writ of Prohibition and the Alternative Writ of Mandamus heretofore issued by this Court in this matter be, and they are each hereby, discharged and dismissed.

June 27, 1957.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 423

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Petitioner,

vs.

EDWARD T. HYDE,

Respondent,

vs.

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and the Other Judges and Officers of the United States District Court, District of Minnesota,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1957

No.....

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Petitioner,

vs.

EDWARD T. HYDE,

Respondent,

vs.

HONORABLE ROBERT C. BELL, Judge of the United States District Court, District of Minnesota, and the Other Judges and Officers of the United States District Court, District of Minnesota,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF CERTIORARI

STATEMENT

Petitioner's statement is entirely inadequate and also misleading. The District Court twice heard the motion to transfer under 28 *U.S.C.A.*, Sec. 1404(a), and, as the district judge's certificate shows, considered all pertinent factors in reaching his decision. A considerable portion of both petitioner's and respondent's arguments in the Court of Appeals were devoted to a discussion of the merits of the District Court's order to transfer. All factors affecting the merits of the order to transfer were entirely eliminated from

the case by the decision of the Court of Appeals holding that it lacked jurisdiction to consider the merits and that it denied petitioner's petition solely upon the ground of lack of jurisdiction to grant either mandamus or prohibition to review the transfer order of the District Court.

The question presented by petitioner's petition to this Court thus presents only the question whether the Court of Appeals has jurisdiction to review a transfer order made under 28 *U.S.C.A.*, Sec. 1404(a), regardless of the merits. The distinction between "jurisdiction" and "merits" is not only a fundamental one, but also one which this Court has long recognized and enforced. The decisions of this Court settle the rule that "jurisdiction" is the power, conferred by law, to hear and determine a case and that "merits" consist of the various elements of which enter into or qualify plaintiff's right to the relief sought. Implicit in the rule is the principle that "jurisdiction" never depends upon the "merits" of the case brought into court and that "jurisdiction" so defined includes the power to decide cases regardless of their "merits." In fact, the very purpose of exercising "jurisdiction" is to determine the "merits" of a given case.

General Inv. Co. v. New York Cent. R. Co., 271 U.S. 228, 46 S.Ct. 496, 70 L.Ed. 920.

Binderup v. Pathe Exchange, 263 U.S. 291, 44 S.Ct. 496, 68 L.Ed. 308.

Fauntleroy v. Lum, 210 U.S. 230, 28 S.Ct. 451, 52 L.Ed. 1039.

As said in 14 *Am. Jur., Courts*, Sec. 161, pp. 364-365:

"Jurisdiction does not relate to the right of the parties as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity (right) to be enforced or the right of the plaintiff to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely con-

sistent with a denial of any equity (right), either in the plaintiff or in anyone else."

A more correct and accurate statement of the question presented by the petition, in view of the decision and proceedings in the Court of Appeals and also of the legal implications of what is comprehended in and implicit of the jurisdictional question raised thereby, is:

> Does a United States Court of Appeals have jurisdiction to grant either mandamus or prohibition to review an order of the United States Court transferring the place of trial from one district to another, where such transfer order is not appealable and is consequently an interlocutory one?

Such a statement serves the purpose of eliminating extraneous questions relative to the merits, which have nothing at all to do with those pertaining to jurisdiction and at the same time to present to the Court the question in such shape that only those matters relevant thereto will be considered.

STATUTES INVOLVED

Petitioner has not mentioned as among the statutes involved:

28 *U.S.C.A.*, Sec. 1691.

28 *U.S.C.A.*, Sec. 1692.

Rule 73, *Federal Rules of Civil Procedure*, should be considered with these statutes. Thus, not only the statutes mentioned by petitioner but also those mentioned above as well as Rule 73 are involved. Sufficient reference thereto is made herein where same are discussed.

CASES DEEMED CONTROLLING OR APPOSITE

Courts of appeal do not have jurisdiction to issue mandamus or prohibition to review change of venue orders made under Sec. 1404(a).

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106.

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185.

Clayton & Warlick, 4 Cir., 232 F.2d 699.

In re Josephson, 1 Cir., 218 F.2d 174.

Prohibition should not issue to review an interlocutory order.

Ex parte Johns, 191 U.S. 93, 24 S.Ct. 27, 48 L.Ed. 110.

U. S. v. Hoffman, 4 Wall. 158, 18 L.Ed. 354.

Mandamus should not issue to review an interlocutory order.

Carr v. Donohue, 8 Cir., 201 F.2d 426.

Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379.

ARGUMENT

I.

THE UNITED STATES COURTS OF APPEALS HAVE JURISDICTION ONLY OF APPEALS FROM "FINAL DECISIONS OF THE DISTRICT COURTS" UNDER 28 U.S.C.A., SECTIONS 1291 AND 1292, AND RULE 73, FEDERAL RULES OF CIVIL PROCEDURE.

This elementary proposition of law apparently is not disputed, but it is obscured by the petitioner's argument.

Section 1291 is explicit—it provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

Section 1292 is equally explicit in enumerating the appealable interlocutory decisions, which are:

> "The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts of the judges thereof determining the right and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;
>
> (4) Judgments in civil actions for patent infringement which are final except for accounting."

An "interlocutory order" is not a "final decision" and consequently is not appealable under the statutes and the rule.

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185.

Transfer orders of place of trial, including such orders made under 28 *U.S.C.A.*, Sec. 1404(a), are not appealable for the reason that such orders are interlocutory in character.

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106. (Order made under Sec. 1406(a).)

In re Josephson, 1 Cir., 218 F.2d 174.

Ford Motor Co. v. Ryan, 2 Cir., 182 F.2d 329.

Clayton v. Warlick, 4 Cir., 232 F.2d 699.

Ex parte Chas. Pfizer & Co., 5 Cir., 225 F.2d 720.

Carr v. Donohue, 8 Cir., 201 F.2d 426.

Petitioner proceeded in the Court of Appeals upon the assumption that the transfer order made by the District Court was not appealable. It alleged in paragraph XVI of the petition for mandamus or prohibition in the Court of Appeals (Record below at p. 73):

> "That this petition for a writ of mandamus and for a writ of prohibition is made to this court for the reason that no statutory appeal lies from the said order of the United States District Court, District of Minnesota, Third Division, granting plaintiff's alternative motion to transfer the venue of said action to the United States District Court, Northern District of California, under Section 1404(a) of the United States Judicial Code, and denying defendant's motion to transfer the venue of said action to the United States District Court, Western District of Washington, sitting at Seattle, Washington, * * *"

Thus, petitioner not only admitted the rule as to the appealability of transfer orders under Section 1404(a) to be as we have stated it, but also should now be precluded from taking a different position with respect thereto.

II.

A UNITED STATES COURT OF APPEALS DOES NOT HAVE JURISDICTION UNDER THE ALL WRITS STATUTE (28 U.S.C.A., SEC. 1651) TO GRANT WRITS OF MANDAMUS AND PROHIBITION TO REVIEW NON-APPEALABLE OR INTERLOCUTORY ORDERS OF THE UNITED STATES DISTRICT COURTS, TRANSFERRING THE PLACE OF TRIAL MADE UNDER SECTION 1404 (a).

So far as here pertinent Section 1651(a) provides:

> "* * * all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Mandamus does not lie according to well settled usages and principles of law to review and set aside an interlocutory decision of a District Court.

The cases cited below establish beyond question that an order to transfer under Section 1404(a) made on a motion is an interlocutory order. The rule is established by all the decisions of the Supreme Court of the United States, including its first, last and all intermediate pronouncements upon the question and also by the decisions of this Court, which has not only consistently, but also correctly followed those decisions. We shall cite only some of the cases, but at the same time shall cite some standard texts where these decisions are collected in a veritable array of authority.

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106;

Ex parte Collett, 337 U.S. 55, 69 S.Ct. 994, 98 L.Ed. 1207;

Ex parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041;

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185;

Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379;

United States v. Lawrence (1795), 3 Dall. 42, 1 L.Ed. 502;

Carr v. Donohue (8 Cir.), 201 F.2d 426;

Larsen v. Nordbye (8 Cir.), 181 F.2d 765;

United States v. Nordbye (8 Cir.), 75 F.2d 744;

United States, etc., v. Maine Potato Growers, etc., 88 F.2d 780, 66 U.S. D.C. App. 398.

The authorities are collected in 35 *Am. Jur., Mandamus*, Secs. 258-259.

The case of *United States v. Lawrence*, supra, decided in 1795, was the first one to come before the Supreme Court of the United States in which it was sought, as here, to compel a district judge to decide a case in a particular way. In that case Judge Lawrence had by an order decided that the evidence presented to him was insufficient to authorize the issuance of a warrant to seize a ship. In holding that mandamus would not lie, the Court said (4 Dall. 53, 1 L.Ed. 507):

> "We are clearly and unanimously of the opinion that a *mandamus* ought not to issue. It is evident, that the District Judge was acting in a judicial capacity, when he determined, that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain *Barre:* and (whatever might be the difference of sentiment entertained by this Court) we have no power to compel a Judge to decide according to the dictates of any judgment, but his own."

In *Bankers Life & Casualty Co. v. Holland*, supra, this Court reviewed many of its prior decisions. In that case the Court granted an order of severance and transfer of the case as to one defendant on the ground that the venue laid was improper as to-wit. The Court said (346 U.S. 382-383, 74 S.Ct. 147-148):

"The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 U.S.C., Sec. 1561(a), 28 U.S.C.A., Sec. 1651(a). As was pointed out in Roche v. Evaporated Milk Ass'n (1943), 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185, the 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. The ruling on a question of law decisive of the issue presented by Cravey's motion and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. Ex parte American Steel Barrel Co. (1913), 230 U.S. 35, 45-46, 33 S.Ct. 1007, 1010, 1011, 57 L.Ed. 1379; Ex parte Roe (1914), 234 U.S. 70, 73, 34 S.Ct. 722, 723, 58 L.Ed. 1217. Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, Roche v. Evaporated Milk Ass'n, supra, and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs

> Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in De Beers Consolidated Mines v. United States (1945), 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566. This is not such a case."

The Court further pointed out that the statutes defining the cases in which the Courts of Appeal have jurisdiction not only excluded by the clearest implication a right of review in other cases by other writs, such as mandamus, but also that the Congress must have contemplated that the District Courts might commit error by interlocutory orders and that such errors were to be reviewed and corrected by appeal only in the cases where the statutes authorized such appeals. The other decisions of the Supreme Court cited above use language similar to that which we have just quoted above from the *Bankers Life & Casualty* case.

In the case of *Carr v. Donahue*, supra, the Court held that mandamus and prohibition should not be issued to prevent a district judge from transferring under Section 1404(a) an act commenced in the United States District Court.

In the case of *Larsen v. Nordbye*, supra, the Court held that writ of mandamus would not issue to compel a district judge to permit the plaintiff, in an action commenced in the District Court, to dismiss without prejudice after the Court had ordered the case transferred from the District of Minnesota to the Southern District of Iowa. The Court said (181 F.2d 766):

> "It (a writ of mandamus) may issue to command judicial officers to hear and to decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment, because such action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officers or officers to

whose judgment and discretion the law intrusted the decision of the issue. For the same reason it cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision."

Prohibition does not lie according to well settled usage and principles of law to review and set aside an interlocutory decision of a District Court.

This rule is well settled. It makes no difference in the application of the rule whether the petitioner claims that the trial judge erred or whether the appellate court is of the opinion that error actually occurred below.

Ex parte Johns, 191 U.S. 93, 24 S.Ct. 27, 48 L.Ed. 110;
U. S. v. Hoffman, 4 Wall. 158, 18 L.Ed. 354;
42 *Am. Jur., Prohibition*, Sec. 30, pp. 165-166;
73 *C.J.S., Prohibition*, Sec. 10, pp. 30-31;
50 *C.J., Prohibition*, Sec. 18, pp. 662-663.

Mr. Justice Miller, speaking for the Court in *U. S. v. Hoffman*, supra, aptly said (18 L.Ed. 355):

> "The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; * * *."

The pertinent part of the text in 42 *Am. Jur., Prohibition*, Sec. 30, supra, reads (42 *Am. Jur.*, pp. 165-166):

> "* * * or, as it has sometimes been said, the writ of prohibition cannot be converted into, or made to serve the purpose of, an appeal, writ of error, or writ of review *to undo* what already has been done."

Prohibition does not lie here for the reason that to do so would be to use the write as an interlocutory appeal from an interlocutory order for the purpose of reviewing such order

after it has become final. This would be directly contrary to well settled usage and legal principles and consequently contrary to the express provisions of 28 *U.S.C.A.*, Sec. 1651, the All Writs Act.

Mandamus does not lie to review or reverse an interlocutory decision of a district judge or to decide a case differently from what he has already done.

Mandamus cannot be used as an interlocutory appeal to review interlocutory orders. The granting of a writ of mandamus to compel a district judge to vacate an order made by him or to decide a motion in a particular way contrary to what he has already decided would be not only an interlocutory review of an interlocutory decision not authorized by law, but also would be a substitution by the appellate court of its views for those of the trial court with respect to a matter committed by law to the trial court for its exclusive decision.

In *Roche v. Evaporated Milk Ass'n*, supra, the United States Court of Appeals, by mandamus, ordered the District Court to reinstate certain pleas in abatement, which the District Court had ordered stricken by an interlocutory order, and then to hear and decide such pleas. Mr. Chief Justice Stone, speaking for this Court, said (319 U.S. 25-26, 63 S.Ct. 941):

> "The common-law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. Ex parte Republic of Peru, supra, 63 S.Ct. 797, and cases cited; Whitney v. Dick, 202 U.S. 132, 136, 140, 26 S.Ct. 584, 586, 587, 50 L.Ed. 963. Hence the question presented on this record is not whether the court below had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power. In determining what is appropriate, we look to those principles which should guide judicial discretion in the use of an extraordinary

remedy rather than to formal rules rigorously controlling judicial action. Considerations of importance to our answer here are that the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling; *and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.*" (Emphasis supplied.)

The Court further said, as did this Court in *Carr v. Donohue*, supra, at 201 F.2d 428 (139 U.S. 27-30, 63 S.Ct. 942-944):

"Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been subscribed or to review an appealable decision of record. * * * citing cases * * *. Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts. 28 U.S.C., Sec. 225(a), 28 U.S.C.A., Sec. 225(a). Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. Cobbledick v. United States, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the

same cause might come before this Court many times, before there would be a final judgment.' * * * (Citing cases.) * * *"

In the case of *Ex parte Steel Barrel Company*, supra, where the Supreme Court of the United States denied a writ of mandamus to compel a judge of the Court of Appeals to vacate an order designating a district judge to hear and decide a matter in bankruptcy, Mr. Justice Lurton, speaking for the Court, said (230 U.S. 46, 57 L.Ed. 1384):

> "Judge Lacombe was clearly called upon to determine, in the exercise of his jurisdiction as the senior circuit judge, whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under Sec. 14 of the new Judicial Code, and we cannot compel him, through a writ of mandamus, to undo what has thus been done. Ex parte Burtis, 102 U.S. 238, 26 L.Ed. 392; Re Parson, 150 U.S. 150, 37 L.Ed. 1034, 14 Sup.Ct.Rep. 50."

In *United States v. Nordbye* (8 Cir.), 75 F.2d 744, this Court denied a writ of mandamus to compel a district judge to allow an appeal. The Court said (75 F.2d 745):

> "Mandamus is ordinarily a remedy for official inaction, and not to compel the undoing of acts already done, or to correct wrongs already perpetrated."

The effect of granting the writ here would not only be to "undo" what Judge Bell has decided, but also for this Court to decide a question which Section 1404(a) has committed to Judge Bell as a district judge for his decision.

In the case of *Ex parte Newman*, 14 Wall. 152, 20 L.Ed. 877, the Court held that mandamus would lie to compel a lower court to take jurisdiction of a case and to exercise judicial power and discretion; but "without any direction as to the manner in which it shall be done."

The views above expressed have been adopted as the rule of this Court.

Hydraulic Press Mfg. Co. v. Moore (8 Cir.), 185 F.2d 800;

Carr v. Donohue, supra;

United States v. Nordbye (8 Cir.), 75 F.2d 744;

Federal Savings & Loan Ass'n v. Reeves (8 Cir.), 148 F.2d 731.

The decision of the Court of Appeals in the instant case is in accord not only with the prior decisions of this Court, but also the decision in the subsequent case of *LaBuy v. Howes Leather Co., Inc.*, 352 U.S. 249, 77 S.Ct. 309.

It appears from what we have said *supra* that the decision of the Court of Appeals in the instant case is in full accord with the views of this Court in prior cases. We should not do more than state that it follows such cases as *Bankers Life & Casualty Co. v. Holland*, supra, and the numerous decisions of this Court there cited.

The decision in the *LaBuy* case is not only not inconsistent with the decision of the Court of Appeals in the instant case, but on the contrary expressly recognizes the correctness of the rule applied below by stating that the rule of the *LaBuy* case was limited to the preliminary matter of compelling a district judge to exercise jurisdiction possessed by him and not to lay down a rule authorizing review by mandamus or otherwise of interlocutory orders for change of venue. As to the application of the rule as one merely compelling a judge to exercise jurisdiction the Court said (77 S.Ct. 313):

Judge LaBuy's acts:

> "* * * amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

In making clear that the rule of the *LaBuy* case was not intended to be applied in *venue* cases this Court said (77 S.Ct. 314):

> "It is claimed that recent opinions of this Court are to the contrary. Petitioner cites Bankers Life & Casualty Co. v. Holland, 1953, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106, and Parr v. United States, 1956, 351 U.S. 513, 76 S.Ct. 912. *The former case did not concern rules promulgated by this Court but, rather, an Act of Congress; the venue statute.*" (Emphasis supplied.)

This Court issued a caveat to both the bench and the bar in *Norwood v. Kirkpatrick*, 349 U.S. 29, 75 S.Ct. 594, that there was no basis for assuming that mandamus and prohibition would lie in cases like the instant one. There the Court said (349 U.S. 33):

> "Since we find that the district judge properly construed Sec. 1404(a), it is unnecessary to pass upon the question of whether mandamus or prohibition is a proper remedy."

III.

THE DECISION IN THE INSTANT CASE SHOULD NOT BE REVIEWED BY CERTIORARI FOR THE REASON THAT IT IS IN ACCORD WITH THE DECISIONS OF THIS COURT.

Petitioner miscounts the Courts of Appeals which it claims holds contra to the decision in the instant case by the United States Court of Appeals for the Eighth Circuit. The Fifth Circuit is now in accord with the Eighth Circuit and the First and Fourth.

Ex parte Chas. Pfizer & Co., 5 Cir., 225 F.2d 720.

The Court of Appeals for the First Circuit made its position more emphatic by holding that it would decline to consider petitions for writs under Section 1651 to review non-appealable interlocutory orders in an opinion by Chief Judge Mag-

ruder in the case of *In re Sylvania Electric Products*, 1 Cir., 220 F.2d 423, where it said (220 F.2d 424):

> "In several recent cases we have done what we could to discourage the loose filing of applications to us under 28 U.S.C., Sec. 1651. In re Chappell & Co., Inc., 1 Cir., 1953, 201 F.2d 343; In re Previn, 1 Cir., 1953, 204 F.2d 417; In re Josephson, 1 Cir., 1954, 218 F.2d 174. In the last-named case we said, 218 F.2d at page 177:
>
> > "'Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U.S.C., Sec. 1651, grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit, and in particular to review by a writ of mandamus any unappealable order which we believe should be immediately reviewable in the interest of justice.'"

We submit that this Court should follow the rule as there stated.

There is no good reason for reviewing a decision, which is correct as a matter of law. Review is for the purpose of correcting error. It would be inappropriate to grant review where none is needed.

The respondent here should not be burdened with the expense incident to review in this Court where such review would serve no good purpose in the case. If it is important to resolve the conflict that exists among the Circuit Courts of Appeals, as petitioner urges, it will be time enough to do so when a case involving error with respect to this question is presented for review.

CONCLUSION

The granting of certiorari here would not bring up for review a decision which should be reviewed for probable error, but, on the contrary, it would needlessly review a decision which is correct. In such a case the Court should decline to issue a writ.

Respectfully submitted,

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